(5)
Supreme Court, U.S.
FILED
JUL 18 2003
OFFICE OF THE CLERK

No. 02-954

In the Supreme Court of the United States

OFFICE OF INDEPENDENT COUNSEL, PETITIONER

v.

ALLAN J. FAVISH, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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Supporting Petitioner
Sheila Foster Anthony and
Lisa Foster Moody

PETITION FOR WRIT OF CERTIORARI FILED: DEC. 20, 2002
CERTIORARI GRANTED: MAY 5, 2003

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(WESTERN DIVISION)

CIVIL DOCKET FOR CASE #: 97-CV-1479

ALLAN J. FAVISH, PLAINTIFF

SHEILA FOSTER ANTHONY; LISA FOSTER MOODY,
INTERVENORS

v.

OIC, DEFENDANT

Filed: Mar. 6, 1997

DOCKET PROCEEDINGS

DATE	DOCKET NUMBER	DOCKET ENTRY
3/6/97	1	COMPLAINT (Summons(es) issued) (referred to Discovery Charles F. Eick) (bg) [Entry date 03/10/97]
		* * * * *
4/28/97	5	ANSWER by defendant OIC to [1-1](lc) [Entry date 04/30/97]
		* * * * *

DATE	DOCKET NUMBER	DOCKET ENTRY
9/8/97	14	NTC OF FILING AND DECLARATION of Kevin A Martin for in camera exam by defendant OIC * * * FILED UNDER SEAL * * * (lc) [Entry date 09/10/97]
	* * * * *	
1/5/98	21	NOTICE of filing and filing of decl of Darrell M. Joseph and Exhs I and III by defendant OIC (pbap) [Entry date 01/07/98]
1/5/98	22	NOTICE of filing and filing of exh II to the decl of Darrell M. Joseph by defendant OIC (pbap) [Entry date 01/07/98]
1/23/98	23	NOTICE of filing suppl decl of Darrell M Joseph by defendant OIC (lc) [Entry date 01/27/98]
2/11/98	24	STIPULATION and ORDER by Judge William D. Keller that all of pltf's claims in this actn as to all information withheld purs to 5 U.S.C. 552(b)(3) which information is located in photographs identified in this actn if Category 5 as Docs 2389A,

DATE	DOCKET NUMBER	DOCKET ENTRY
		2389B, 2389C, 2391A, 2391B, in Category 7 as Docs 2393A, 2393B, 2393C, 2394A, 2394B, and all of the Docs in Category 10, which were identified as Docs 2425A, 2425B, 2426A, 2426B, 2427A, 2427B, 2428A, 2428B), and the pltf's claims as to information withheld purs to 5 U.S.C. 552(b)(7)(C) (which information is located in photographs identified in this actn in Category 8 as Docs 2400C, 2400D, 2401A, 2401B, 2402A, 2402B, 2402C, 2402D, 2403A, 2403B, and in Category 9 as Docs 2415C, 2415D, 2422A, 2422B) are hereby dismissed with prej. (ENT 2/12/98) mld cpys (pbap) [Entry date 02/12/98]
2/11/98	25	NOTICE OF MOTION AND MOTION by plaintiff Allan J Favish for summary adjudication; motion hearing set for 3:00 3/98/98 (lc) [Entry date 02/12/98]

DATE	DOCKET NUMBER	DOCKET ENTRY
2/11/98	—	LODGED stmt of undisputed facts submitted by plaintiff (FWD TO CRD)(lc) [Entry date 02/12/98]
2/13/98	26	NOTICE OF MOTION AND MOTION by defendant OIC for summary judgment; motion hearing set for 3:00 3/9/98 (pbap) [Entry date 02/18/98]
		* * * * *
3/5/98	34	NOTICE of filing org 34d decl of Darrell M Joseph by defendant OIC (lc) [Entry date 03/09/98]
3/6/98	36	NOTICE of filing orig decl of Shelia Foster Anthony by defendant OIC (lc) [Entry date 03/10/98]
3/9/98	37	MINUTES: Bf crt are ptys cross mot fr s/j: Crt ORD granting OIC motion for summary judgment [26-1], terminating case by Judge William D. Keller CR: none (ENT 3/11/98) mld cpys and ntcs pyts MDJS-6(lc) [Entry date 03/11/98]

DATE	DOCKET NUMBER	DOCKET ENTRY
3/13/98	38	NOTICE OF APPEAL by plaintiff Allan J Favish to 9th C/A from Dist. Court ord ent 3/11/97 [37-2] (cc: Allan J. Favish; AUSA Luymes) Fee: Paid (app) [Entry date 03/16/98]
		* * * * *
4/1/98	42	TRANSCRIPT filed for proceedings held on 3/9/98 (pjap) [Entry date 04/07/98]
4/13/98	43	NOTIFICATION by Circuit Court of Appellate Docket Number appeal [38-1] 98-55594 (pjap) [Entry date 04/13/98]
4/14/98	44	CERTIFICATE of Record Transmitted to USCA (cc: all parties) (ghap) [Entry date 04/14/98]
		* * * * *
9/8/00	—	LODGED CC 9thcca Jgmt of Dist Court hereby is Reversed & Remanded. (98-55594) (FWD TO CRD) (weap) [Entry date 09/19/00]
		* * * * *

DATE	DOCKET NUMBER	DOCKET ENTRY
10/13/00	88	CERTIFIED COPY of Appellate Court Order: #98-55594. IT is now here ordered and adjudged by this crt, that the judgment of the said dist crt in this cause be and hereby is REVERSED AND REMANDED. [38-1] (no reopen per crd) SEND (yc) [Entry date 06/04/01]
10/13/00	89	MANDATE from Circuit Court of Appeals #98-55594, the crt orders the office of independent cnsl to deliver the original ten post-mortem Polaroid Photographs at issue to this crt for in camera review. After review the crt w/rule whether the photos fall w/in the privacy exemption. Mandate is filed and spread on record. (SEND) (yc) [Entry date 06/04/01]
		* * * * *
10/17/00	—	TRANSCRIPT filed for proceedings held on 10/13/00 (pjap) [Entry date 10/18/00]
		* * * * *

DATE	DOCKET NUMBER	DOCKET ENTRY
1/9/01	57	Ntc of filing & filing of REPORT of independent cnsl on the death of Vincent Foster filed by defendant OIC (tw) [Entry date 01/11/01]
1/9/01	58	NOTICE of submission under seal of ten original Polariod Pictures to crt for crt's in camera, ex parte examination by defendant OIC (tw) [Entry date 01/11/01]
1/9/01	59	NOTICE of filing & filing of decl of Regina A. McCoy & exh A attached thereto by defendant OIC (tw) [Entry date 01/11/01]
1/9/02	60	NOTICE of filing & filing of appendix to rpt by defendant OIC on death of Vincent Foster (tw) [Enty date 01/11/01]
1/10/01	56	MINUTES: IN CHAMBERS REVIEW OF DOCUMENTS & COURT HEARING: FBI agents are present w/ sealed docs to be reviewed in chambers by the Crt. Immediately following the Crt's review of the docs, the Crt holds a hrg re the stat of its

DATE	DOCKET NUMBER	DOCKET ENTRY
		review. Crt & defense cnsl discuss the crt's intended ord on S/J which the crt will issue by a separate minute ord. Docs are rtn to the FBI agents. by Judge William D. Keller CR: Linda Morris (mch) [Entry date 01/11/01]
1/11/01	61	MINUTES: In this case, the appellate crt appears to have defined the zone of privacy protection as those photographs that are graphic explicit & extremely upsetting. See the decision at pg 1174. As regards the balance of the photographs referenced at pg 46 of exh to the ntc, the crt rules as follows: (see min ord). Accordingly sum jgm is ent in fav of the OIC wi resp to photograph #4 fr the top section of exh list & photographs #3, #6, #7 & #8 identified in the bottom section of the exh list. Absent an appeal, the photographs must be provided to plfs cnsl w/i 60 dys of this ord. In the event neither pty

DATE	DOCKET NUMBER	DOCKET ENTRY
		chooses to appeal, the photographs wil be provided w/i 10 dys of such determination. In the event of an appeal the photographs sbj to the appeal will remain under seal until such time as there is a final decision by the crt of appeals. by Judge William D. Keller CR: n/a (ENT 1/12/01), mld ntcs. (tw) [Entry date 01/12/01]
		* * * * *
1/29/01	64	NOTICE OF MOTION AND MOTION by Sheila Foster Anthony & Lisa Foster Moody to intervene; motion hearing set for 3:00 3/5/0 (tw) [Entry date 01/30/01]
		* * * * *
1/29/01	66	NOTICE OF MOTION AND MOTION by defendant OIC to alter or amend judgment and for clarification; motion hearing set for 10:00 3/5/01 (yc) [Entry date 01/31/01]

DATE	DOCKET NUMBER	DOCKET ENTRY
		* * * * *
2/13/01	68	NOTICE of filing of amd decls of Sheila Foster Anthony & Lisa Foster Moody to comply wi local rule 31.6(tw)] [Entry date 02/14/01]
		* * * * *
3/5/01	75	MINUTES: granting Dfts in Intervention Shelia Foster Anthony & Lisa Foster Moody's motion to intervene [64-1]; denying plf Alan J Favish motion to compel testimony re allegations of illegal government conduct re sbj photographs [62-1], denying dfts intervention's motion to alter or amend judgment and for clarification [66-1]. Mot to appear pro hac GRANTED by Judge William D. Keller CR: Linda Morris (pj) [Entry date 03/08/01]

DATE	DOCKET NUMBER	DOCKET ENTRY
3/9/01	76	NOTICE OF APPEAL by plaintiff Allan J Favish to 9th C/A from Dist. Court min ord ent 1/12/01 [61-1] (cc: Allan J. Favish; Jan L. Luymes; Latham & Watkins; Swidler, Berlin, Shereff & Friedman) Fee: Paid. (ghap) Entry date 03/09/01]
		* * * * *
3/27/01	79	NOTIFICATION by Circuit Court of Appellate Docket Number appeal [76-1] 01-55487 (pjap) [Entry date 03/27/01]
		* * * * *
4/23/01	—	TRANSCRIPT filed for proceedings held on 3/5/01. (ghap) [Entry date 04/24/01]
4/26/01	82	NOTICE OF APPEAL by Defendant in-Intervention Sheila Foster Anthony, Defendant in-Intervention Lisa Foster Moody to 9th C/A from Dist. Court minutes fld 1/11/01 & ent 1/12/01 [61-1] and minutes fld

DATE	DOCKET NUMBER	DOCKET ENTRY
		3/5/01 [75-1] (cc: Lathan Watkins, Swidler Berlin Shereff Friedman, Allan J. Favish, Jan L. Luymes) Fee: Billed (dl) [Entry date 04/27/01]
4/26/01	83	NOTICE OF APPEAL by defendant Office of Independent Counsel ("OIC") to 9th C/A from Dis. Court minutes fld 1/11/01 & ent 1/12/02 [61-1] and minutes fld 3/5/01 [75-1] (cc: Jan L. Luymes, AUSA, Allan J. Favish, Esq., Swidler, Berlin, Shereff & Friedman) Fee: Gov Waived (dl) [Entry date 04/30/01]
		* * * * *
5/16/01	85	NOTIFICATION by Circuit Court of Appellate Docket Number appeal [83-1] 01-55789 (ghap) [Entry date 05/16/01]
5/16/01	86	NOTIFICATION by Circuit Court of Appellate Docket Number appeal [82-1] 01-55788. (ghap) [Entry date 05/16/01]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 98-55594

ALLAN J. FAVISH, PLAINTIFF-APPELLANT

v.

OFFICE OF INDEPENDENT COUNSEL, DEFENDANT-APPELLEE

Filed: Apr. 6, 1998

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
4/6/98	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. setting schedule as follows: appellant's designation of RT is due 3/23/98; appellee's designation of RT is due 4/2/98; appellant shall order transcript by 4/13/98; court reporter shall file transcript in DC by 5/13/98; certificate of record shall be filed by 5/20/98; appellant's opening brief is due 6/29/98; appellees' brief is due 7/29/98; appellants' reply brief is due 8/12/98; [98-55594] (mss) [98-55594]

DATE	PROCEEDINGS
4/6/98	Filed attorney for Appellant Civil Appeals Docketing Statement served on 3/13/98 (to CONFATT) [98-55594] [98-55594] (mss) [98-55594]
	* * * * *
4/13/98	Filed original and 15 copies Appellant Allan J. Favish opening brief (Informal: n) 51 pages and five excerpts of record in 3 volumes; served on 4/9/98 [98-55594] (sa) [98-55594]
	* * * * *
8/20/98	Filed original and 15 copies appellee OIC 42 page brief, five sets Supp. Exc. in one volume; served on 8/12/98 [98-55594] (sa) [98-55594]
	* * * * *
8/31/98	Filed original and 15 copies Allan J. Favish reply brief, (Informal: n) 25 pages; served on 8/23/98 [98-55594] (sa) [98-55594]

DATE	PROCEEDINGS
	* * * * *
9/15/98	FILED CERTIFIED RECORD ON APPEAL; IN 0 CLERKS REC, 1 RTs. (Orig) [98-55594] (jay) [98-55594]
	* * * * *
11/1/99	ARGUED AND SUBMITTED TO Harry PREGERSON, John T. NOONAN, Diarmuid F. O'SCANNLAIN [98-55594] (rmw) [98-55594]
	* * * * *
7/12/00	FILED OPINION: REVERSED AND REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Harry PREGERSON, partial concurrence and partial dissent; John T. NOONAN, author; Diarmuid F. O'SCANNLAIN.) FILED AND ENTERED JUDGMENT. [98-55594] (crw) [98-55594]
	* * * * *
9/6/00	MANDATE ISSUED [98-55594] (crw) [98-55594]
	* * * * *

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-55487

ALLAN J. FAVISH, PLAINTIFF-APPELLANT

SHEILA FOSTER ANTHONY; LISA FOSTER MOODY, INTERVENORS-APPELLANTS

v.

OFFICE OF INDEPENDENT COUNSEL, DEFENDANT

Filed: Mar. 20, 2001

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
3/20/01	DOCKETED CAUSE AND ENTERED APPEARANCE OF APLT IN PRO PER (REPRESENTING SELF AS COUNSEL OF RECORD) AND COUNSEL FOR APLES. CADS SENT (Y/N): N. setting schedule as follows: appellant's designation of RT is due 3/19/01; appellee's designation of RT is due 3/29/01; appellant shall order transcript by 4/9/01; court reporter shall file transcript in DC by 5/9/01; certificate of record shall be filed by 5/16/01; appellant's opening brief is due 6/25/01; appellees' brief is due 7/25/01; appellants' reply brief is due 8/8/01; [01-55487] (pg) [01-55487]

DATE	PROCEEDINGS
3/20/01	Filed Allan J. Favish's Civil Appeals Docketing Statement served on 3/9/01 (to CONFATT) [01-55487] [01-55487] (pg) [01-55487]
	* * * * *
5/30/01	Filed original and 15 copies Appellant Allan J. Favish opening brief (Informal: No) 69 pages and excerpts of record in 3 volumes; served on 5/25/01 [01-55487] (kkw) [01-55487]
5/30/01	Filed Appellant Allan J. Favish in 01-55487's motion to hear case before same panel as in prior appeal served on 5/25/01 [4178643] MOATT [01-55487] (kkw) [01-55487]
6/4/01	Filed order (Deputy Clerk: jes) The court, on its own motion, consolidates appeal nos. 01-55788, and 01-55789. These consolidated appeals are hereby designated as X-appeals from appeal no. 01-55487. All previous briefing schedules are vacated. The following briefing schedule shall govern these X-appeals: Favish's opn brief is due 7/20/01; Office of Independent Counsel's and Anthonys' ans brief are due 8/29/01; Favish's rpy brief is due 9/29/01; the Office of Independent

DATE	PROCEEDINGS
	Counsel's and Anthonys' opt rpy briefs are due within 14 days after service of Favish's rpy biref. All parties on a side are encouraged to join in a single brief to the greatest extent practicable. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
	* * * * *
9/17/01	Filed original and 15 copies OIC in 01-55487, OIC in 01-55789 second brief on cross-appeal (Informal: No) of 48 pages; served on 9/12/01 [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
9/19/01	Filed original and 15 copies Lisa Foster Moody, Sheila Foster Anthony, second brief on cross-appeal (Informal: No) of 24 pages and 1 vol. excerpts of record; served on 9/11/01 [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
10/9/01	Filed original and 15 copies Allan J. Favish in 01-55487, Allan J. Favish in 01-55788, Allan J. Favish in 01-55789 third brief on cross-appeal (Informal: No) of 35 pages and 5 copies excerpts of record;

DATE	PROCEEDINGS
	(minor defcy: cover should be red); served on 10/6/01 [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
10/12/01	Filed order (Harry PREGERSON, John T. NOONAN, Diarmuid F. O'SCANNLAIN,): Aplt/X-Aple Favish's motion for assignment of these consolidated appeals to the previously constituted panel is granted. The Clerk shall assign these consolidated cases to Judges Pregerson, Noonan and O'Scannlain upon the completion of briefing. in 01-55487 [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
	* * * * *
10/25/01	Filed original and 15 copies Lisa Foster Moody, Sheila Foster Anthony reply brief, (Informal: No) of 5 pages; served on 10/24/01 [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
11/13/01	Filed original and 15 copies Sheila Foster Anthony , OIC, reply brief, (Informal: No) of 10 pages; served on 11/9/01 [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
	* * * * *

DATE	PROCEEDINGS
2/25/02	Filed Appellee in 01-55487's response to Chamber's request for photo on 2/20/02 ; served on 2/22/02 PANEL. [01-55487] (kkw) [01-55487]
	* * * * *
6/4/02	Filed order (Harry PREGERSON, John T. NOONAN, Diarmuid F. O'SCANNLAIN,) The judges on the panel to which these cases have been assigned have unanimously determined that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, these cases were submitted on the briefs and records on 5/20/02 in San Francisco, Ca. without oral argument. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
6/6/02	FILED MEMORANDUM DISPOSITION: AFFIRMED (Terminated on the Merits after Submission Without Oral Hearing; Affirmed; Written, Unsigned, Unpublished. Harry PREGERSON, John T. NOONAN, Diarmuid F. O'SCANNLAIN) FILED AND ENTERED JUDGMENT. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
	* * * * *

DATE	PROCEEDINGS
7/11/02	Filed Allan J. Favish 's motion to stay the mandate to file a petition for writ of certiorari with the U.S. Supreme Court. served on 7/8/02 PANEL. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
7/22/02	Filed order (Harry PREGERSON, John T. NOONAN, Diarmuid F. O'SCANNLAIN,): Aplt's mtn to stay the mandate is denied. Judge Pregerson would grant the mtn. in 01-55487, 01-55788, 01-55789 [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
7/22/02	Filed original and 50 copies OIC petition for panel rehearing and petition for rehearing en banc 19 p.pages, served on 7/19/02 PANEL AND ACTIVE JUDGES. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
7/22/02	Filed original and 50 copies Lisa Foster Moody , Sheila Foster Anthony petition for panel rehearing and petition for rehearing en banc 19 pages, served on 7/19/02 PANEL AND ACTIVE JUDGES. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]

DATE	PROCEEDINGS
8/16/02	Filed order (Harry PREGERSON, John T. NOONAN, Diarmuid F. O'SCANNLAIN,): . . . The petitions for rehearing are denied and the suggestions for rehearing en banc are denied. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
8/20/02	Filed OIC and USA motion to stay the mandate. Served on 8/19/02 PANEL. (kkw) [01-55487 01-55788 01-55789]
8/21/02	Filed Lisa Foster Moody & Sheila Foster Anthony motion to stay the mandate. served on 8/20/02 PANEL. (kkw) [01-55487 01-55788 01-55789]
9/5/02	Filed order (Harry PREGERSON, John T. NOONAN, Diarmuid F. O'SCANNLAIN): The motions filed by the parties to stay the mandate for 90 days are granted. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
9/20/02	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 02-409 filed on 9/11/02. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]

* * * * *

DATE	PROCEEDINGS
12/30/02	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 02-954 filed on 12/20/02. PANEL. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
5/9/03	Received notice from Supreme Court, petition for certiorari GRANTED on 5/5/03. Supreme Court No. 02-954 PANEL. (kkw) [01-55487 01-55788 01-55789]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-55788

ALLAN J. FAVISH, PLAINTIFF-APPELLANT

SHEILA FOSTER ANTHONY; LISA FOSTER MOODY, INTERVENORS-APPELLANTS

v.

OFFICE OF INDEPENDENT COUNSEL, DEFENDANT

Filed: May 15, 2001

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
5/15/01	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): y. Setting schedule as follows: CADS is past due; CADS must be filed no later than 5/22/01 for G. Andrew Lundberg; appellant's designation of RT is due 5/7/01; appellee's designation of RT is due 5/16/01; appellant shall order transcript by 5/29/01, ; court reporter shall file transcript in DC by 6/26/01; certificate of record shall be filed by 7/3/01; appel

DATE	PROCEEDINGS
	lant's opening brief is due 8/13/01, ; appellees' brief is due 9/11/01; appellants' reply brief is due 9/25/01; [01-55788] (rmw) [01-55788]
5/23/01	Filed James Hamilton for Appellants Lisa Foster Moody and Sheila Foster Anthony's Civil Appeals Docketing Statement; served on 5/18/01 (to CONFATT) [01-55788] [01-55788] (hh) [01-55788]
6/4/01	Filed order (Deputy Clerk: jes) The court, on its own motion, consolidates appeal nos. 01-55788, and 01-55789. These consolidated appeals are hereby designated as X-appeals from appeal no. 01-55487. All previous briefing schedules are vacated. The following briefing schedule shall govern these X-appeals: Favish's opn brief is due 7/20/01; Office of Independent Counsel's and Anthonys' ans brief are due 8/29/01; Favish's rpy brief is due 9/29/01; the Office of Independent Counsel's and Anthonys' opt rpy briefs are due within 14 days after service of Favish's rpy brief. All parties on a side are encouraged to join in a single brief to the greatest extent practicable. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]

DATE	PROCEEDINGS
	* * * * *
9/17/01	Filed original and 15 copies OIC in 01-55487, OIC in 01-55789 second brief on cross-appeal (Informal: No) of 48 pages; served on 9/12/01 [01-55487, 01-55788, 01-55789](kkw) [01-55487 01-55788 01-55789]
9/19/01	Filed original and 15 copies Lisa Foster Moody, Sheila Foster Anthony, second brief on cross-appeal (Informal: No) of 24 pages and 1 vol. excerpts of record; served on 9/11/01 [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
10/9/01	Filed original and 15 copies Allan J. Favish in 01-55487, Allan J. Favish in 01-55788, Allan J. Favish in 01-55789 third brief on cross-appeal (Informal: No) of 35 pages and 5 copies excerpts of record; (minor defcy: cover should be red); served on 10/6/01 [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
10/12/01	Filed order (Harry PREGERSON, John T. NOONAN, Diarmuid F. O'SCANNLAIN,): Aplt/X-Aple Favish's motion for assignment of these consolidated appeals to the previously constituted panel is granted. The Clerk shall assign these consoli

DATE	PROCEEDINGS
	dated cases to Judges Pregerson, Noonan and O'Scannlain upon the completion of briefing in 01-55487 [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
	* * * * *
11/13/01	Filed original and 15 copies Sheila Foster Anthony, OIC, reply brief, (Informal: No) of 10 pages; served on 11/9/01 [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
	* * * * *
6/4/02	Filed order (Harry PREGERSON, John T. NOONAN, Diarmuid F. O'SCANNLAIN,) The judges on the panel to which these cases have been assigned have unanimously determined that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, these cases were submitted on the briefs and records on 5/20/02 in San Francisco, Ca. without oral argument. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]

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6/6/02	FILED MEMORANDUM DISPOSITION: AFFIRMED (Terminated on the Merits after Submission Without Oral Hearing; Affirmed; Written, Unsigned, Unpublished. Harry PREGERSON, John T. NOONAN, Diarmuid F. O'SCANNLAIN) FILED AND ENTERED JUDGMENT. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
	* * * * *
7/11/02	Filed Allan J. Favish 's motion to stay the mandate to file a petition for writ of certiorari with the U.S. Supreme Court. served on 7/8/02 PANEL. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
7/22/02	Filed order (Harry PREGERSON, John T. NOONAN, Diarmuid F. O'SCANNLAIN,): Aplt's mtn to stay the mandate is denied. Judge Pregerson would grant the mtn. in 01-55487, 01-55788, 01-55789 [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
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8/16/02	Filed order (Harry PREGERSON, John T. NOONAN, Diarmuid F. O'SCANNLAIN,): . . . The petitions for rehearing are denied and the suggestions for rehearing en banc are denied. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
8/20/02	Filed OIC and USA motion to stay the mandate. Served on 8/19/02 PANEL. (kkw) [01-55487 01-55788 01-55789]
8/21/02	Filed Lisa Foster Moody & Sheila Foster Anthony motion to stay the mandate. served on 8/20/02 PANEL. (kkw) [01-55487 01-55788 01-55789]
9/5/02	Filed order (Harry PREGERSON, John T. NOONAN, Diarmuid F. O'SCANNLAIN,): The motions filed by the parties to stay the mandate for 90 days are granted. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]

DATE	PROCEEDINGS
9/20/02	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 02-409 filed on 9/11/02. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
	* * * * *
12/30/02	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 02-954 filed on 12/20/02. PANEL. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
5/9/03	Received notice from Supreme Court, petition for certiorari GRANTED on 5/5/03. Supreme Court No. 02-954 PANEL. (kkw) [01-55487 01-55788 01-55789]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-55789

ALLAN J. FAVISH, PLAINTIFF-APPELLANT

v.

OFFICE OF INDEPENDENT COUNSEL, DEFENDANT-APPELLANT

SHEILA FOSTER ANTHONY; LISA FOSTER MOODY, DEFENDANTS-INTERVENORS

Filed: May 15, 2001

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
5/15/01	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. Setting schedule as follows: CADS is past due; CADS must be filed no later than 5/22/01 for Jan L. Luymes; appellant's designation of RT is due 5/7/01; appellee's designation of RT is due 5/16/01; appellant shall order transcript by 5/29/01; court reporter shall file transcript in DC by 6/26/01; certificate of record shall be filed by 7/3/01; appellant's opening brief is due 8/13/01; appellees' brief is due 9/11/01; appellants' reply brief is due 9/25/01; [01-55789] (rmw) [01-55789]

DATE	PROCEEDINGS
	* * * * *
5/23/01	Filed attorney for Appellant in 01-55789 Civil Appeals Docketing Statement served on 5/22/01 (to CONFATT) [01-55789] [01-55789] (em) [01-55789]
	* * * * *
6/4/01	Filed order (Deputy Clerk: jes) The court, on its own motion, consolidates appeal nos. 01-55788, and 01-55789. These consolidated appeals are hereby designated as X-appeals from appeal no. 01-55487. All previous briefing schedules are vacated. The following briefing schedule shall govern these X-appeals: Favish's opn brief is due 7/20/01; Office of Independent Counsel's and Anthonys' ans brief are due 8/29/01; Favish's rpy brief is due 9/29/01; the Office of Independent Counsel's and Anthonys' opt rpy briefs are due within 14 days after service of Favish's rpy brief. All parties on a side are encouraged to join in a single brief to the greatest extent practicable. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
	* * * * *

DATE	PROCEEDINGS
9/17/01	Filed original and 15 copies OIC in 01-55487, OIC in 01-55789 second brief on cross-appeal (Informal: No) of 48 pages; served on 9/12/01 [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
9/19/01	Filed original and 15 copies Lisa Foster Moody, Sheila Foster Anthony, second brief on cross-appeal (Informal: No) of 24 pages and 1 vol. excerpts of record; served on 9/11/01 [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
10/9/01	Filed original and 15 copies Allan J. Favish in 01-55487, Allan J. Favish in 01-55788, Allan J. Favish in 01-55789 third brief on cross-appeal (Informal: No) of 35 pages and 5 copies excerpts of record; (minor defcy: cover should be red); served on 10/6/01 [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
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	briefing. in 01-55487 [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
	* * * * *
10/25/01	Filed original and 15 copies Lisa Foster Moody, Sheila Foster Anthony reply brief, (Informal: No) of 5 pages; served on 10/24/01 [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
11/13/01	Filed original and 15 copies Sheila Foster Anthony, OIC, reply brief, (Informal: No) of 10 pages; served on 11/9/01 [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
	* * * * *
6/4/02	Filed order (Harry PREGERSON, John T. NOONAN, Diarmuid F. O'SCANNLAIN,) The judges on the panel to which these cases have been assigned have unanimously determined that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, these cases were submitted on the briefs and records on 5/20/02 in San Francisco, Ca. without oral argument. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]

DATE	PROCEEDINGS
6/6/02	FILED MEMORANDUM DISPOSITION: AFFIRMED (Terminated on the Merits after Submission Without Oral Hearing; Affirmed; Written, Unsigned, Unpublished. Harry PREGERSON, John T. NOONAN, Diarmuid F. O'SCANNLAIN) FILED AND ENTERED JUDGMENT. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
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8/21/02	Filed Lisa Foster Moody & Sheila Foster Anthony motion to stay the mandate. served on 8/20/02 PANEL. (kkw) [01-55487 01-55788 01-55789]
9/5/02	Filed order (Harry PREGERSON, John T. NOONAN, Diarmuid F. O'SCANNLAIN): The motions filed by the parties to stay the mandate for 90 days are granted. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]

DATE	PROCEEDINGS
9/20/02	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 02-409 filed on 9/11/02. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
	* * * * *
12/30/02	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 02-954 filed on 12/20/02. PANEL. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
5/9/03	Received notice from Supreme Court, petition for certiorari GRANTED on 5/5/03. Supreme Court No. 02-954 PANEL. (kkw) [01-55487 01-55788 01-55789]

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 97-1479

ALLAN J. FAVISH, PLAINTIFF

v.

OFFICE OF THE INDEPENDENT COUNSEL, DEFENDANT

[Filed: Mar.5, 1997]

COMPLAINT FOR INJUNCTIVE RELIEF UNDER FREEDOM OF INFORMATION ACT (5 U.S.C § 552)

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1. This action is brought under the Freedom of Information Act (FOIA), as amended (5 U.S.C. § 552(a)(4)(B)), and seeks a preliminary and final injunction thereunder against the defendant for withholding certain records from plaintiff. This action seeks an order that the records be disclosed.

2. Plaintiff is an individual resident of Los Angeles County, California. Defendant, Office of the Independent Counsel, is a federal administrative agency within the meaning of the Act.

3. Venue of this action is properly laid in this court.

4. Defendant, Office of the Independent Counsel, maintains certain records consisting of photographs

taken in connection with the investigation into the death of Vincent Foster, as follows:

(A) The photographs of a gun that were published on pages 2406-2412 & 2436 of volume 2 Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

(B) The photograph of a gun alleged to be of Mr. Foster's hand with a gun still in it that was broadcast by ABC-TV News in March of 1994 and reprinted in Time magazine (March 18, 1996, p. 68). For tentative identification purposes only, this photograph appears to be the first Polaroid listed among the set of eight listed at the bottom of page 2112 of S. Hrg. Volume 2 (see category (C), below).

(C) The photographs listed on page 2112 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

(D) The photographs of a gun and accompanying materials that were published on pages 2395-2399 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

(E) The Photographs published on pages 2388-2391 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

(F) The photographs published on page 2392 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

(G) The photographs published on pages 2393-2394 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

(H) The photographs published on pages 2399-2405 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

(I) The photographs published on pages 2413-2424 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

(J) The photographs published on pages 2425-2428 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

5. By letter dated January 6, 1997, plaintiff requested that defendant, through the appropriate officer or employee thereof, disclose the records described above to plaintiff and that it permit inspection and copying of the records. See exhibit 1, attached hereto. Such request was refused in writing by defendant on January 24, 1997, citing 5 U.S.C. §§ 552(b)(7)(A) & (C). See exhibit 2, attached hereto.

6. By letter dated January 28, 1997, plaintiff appealed defendant's denial of plaintiff's request. See exhibit 3, attached hereto.

7. By letter dated February 19, 1997, defendant denied plaintiff's appeal. See exhibit 4, attached hereto.

8. The records sought are not covered by the FOIA exemptions and defendant has waived all FOIA exemptions by voluntarily disclosing most of the requested records to third parties.

9. Plaintiff has employed attorneys to represent him in this action, and has incurred and will continue to incur expenses for attorney's fees and costs herein.

10. The subject records were and are identifiable records within the meaning of the Freedom of Information Act. Defendant's refusal to disclose the records to plaintiff was wrongful and without lawful reason or excuse, and plaintiff is entitled to the relief provided by the Act.

Wherefore, plaintiff prays:

1. For preliminary and final injunctions prohibiting defendant from withholding from plaintiff the subject records;

2. For preliminary and final injunctions directing defendant to make such records available to plaintiff and permit the inspection and copying thereof;

3. For attorney's fees and costs, and for such other and further relief as to the court may deem proper.

Dated: March 5, 1997

Respectfully submitted,
ROBERT L. REEVES, a PLC
Attorneys for Plaintiffs

By: ROBERT L. REEVES
ROBERT L. REEVES
Attorney at Law

Allan J. Favish
Attorney at Law
18645 Hatteras St., #289
Tarzana, CA 91356-1802

Voice & Fax
Web Site: http://members.sol.com/AllanF8702/page.htm
Compuserve: 71177,3044
America Online: AllanF8702
Direct Internet: *AJFavish@worldnet.att.net*

January 6, 1997

FOIA Officer
Office of Independent Counsel
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: Freedom of Information Act Request

Dear FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. Sec. 552.

I request copies of the following documents: Photographs taken in connection with the investigation into the death of Vincent Foster. The specific photographs I request are the following:

1. The photographs of a gun that were published on pages 2406-2412 & 2436 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

2. The photograph of a gun alleged to be of Mr. Foster's hand with a gun still in it that was broadcast by ABC-TV News in March of 1994 and reprinted in

Time magazine (March 18, 1996, p. 68). For tentative identification purposes only, this photograph appears to be the first Polaroid listed among the set of eight listed at the bottom of page 2112 of S. Hrgs. volume 2 (see category 3, below).

3. The photographs listed on page 2112 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

4. The photographs of a gun and accompanying materials that were published on pages 2395-2399 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

5. The photographs published on pages 2388-2391 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

6. The photographs published on page 2392 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

7. The photographs published on pages 2393-2394 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

8. The photographs published on pages 2399-2405 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

9. The photographs published on pages 2413-2424 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

10. The photographs published on pages 2425-2428 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

My preference is to obtain the highest quality duplicate photographic prints and negatives of the requested photographs. I assume this would include negatives to be made from the first generation copies of any Polaroid prints and duplicate negatives made from original 35 mm, etc., negatives. If that is not allowable under the law, please state the reason why, in which case I request high quality photocopies. I also request that my copies be in color if the original photograph is in color.

Naturally, any production of photographs by you should be labeled to correspond with one of the appropriate nine categories listed above and labeled to correspond with the photographs as published and listed in the Senate Hearings volumes.

I believe this request should be granted because, to the best of my knowledge, all of the photographs I am requesting have already been published or listed in the Senate Hearings volumes. With regard to those photographs that have already been published, I merely am seeking higher quality images of those photographs.

I would like two sets of the photographs.

I am willing to pay fees for this request up to a maximum of $2000 per set of photographs. If you estimate that the fees will exceed this amount, please inform me first.

If my request is denied in whole or in part, please specify which exemptions are claimed for each document denied. Also, please specify the office and address to which an appeal of any denial should be directed.

Please feel free to telephone or fax if there are any questions of if you need additional information from me.

I expect a response to this request within ten working days, as provided for in the Freedom of Information Act.

Thank you for your consideration of this request.

Sincerely,

/s/ ALLAN J. FAVISH
ALLAN J. FAVISH
Attorney at Law

Office of the Independent Counsel

1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688
Fax (202) 514-8802

January 24, 1997

Mr. Allan J. Favish
Attorney at Law
18645 Hatteras Street, #289
Tarzana, CA 91356-1802

Dear Mr. Favish:

We have completed our review of your Freedom of Information Act request dated January 6, 1997, specifying 10 categories of photographs. Based on that review, we have determined that the photos must be withheld pursuant to FOIA Exemption (b)(7)(A), which pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to interfere with enforcement proceedings, and (b)(7)(C), which provides protection for law enforcement information the disclosure of which could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Accordingly, the photographs you have requested are not appropriate for discretionary release. In asserting only Exemptions (b)(7)(A) and (b)(7)(C) with respect to these photos, this Office does not waive its ability to assert other relevant exemptions if need be. *See e.g.*, *Young* v. *CIA*, 972 F.2d 536, 538-539 (4th Cir. 1992); *Gula* v. *Meese*, 699 F. Supp. 956, 959 n.2 (D.D.C. 1988).

If you are dissatisfied with my action on this request, you may appeal from this denial by writing to John Bates, Deputy Independent Counsel, Office of the Independent Counsel, 1001 Pennsylvania Ave., N.W., Room 490-North, Washington, D.C. 20004, within 30 days of your receipt of this letter. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal." In the event you are dissatisfied with the results of any such appeal, judicial review will thereafter be available to you in an appropriate United States District Court. *See* 5 U.S.C. § 552(A)(4)(B).

Sincerely,

/s/ STEPHEN A. KUBIATOWSKI
STEPHEN A. KUBIATOWSKI
Associate Independent Counsel

Allan J. Favish
Attorney at Law
18645 Hatteras St., #289
Tarzana, CA 91356-1802

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Compuserve: 71177,3044
America Online: AllanF8702
Direct Internet: *AJFavish@worldnet.att.net*

January 28, 1997

Mr. John Bates
Deputy Independent Counsel
Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W.
Room 490-North
Washington, D.C. 20004

By Fax and Mail

Re: Freedom of Information Act Appeal

Dear Mr. Bates:

This is a letter regarding my Freedom of Information Act request dated January 6, 1997.

By letter dated January 24, 1997, your office is withholding the photographs I requested by claiming the exemptions under 5 U.S.C. §§ 552(b)(7)(A) & (b)(7)(C). These exemptions are for documents "compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings . . . (C) could

reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ."

I am a reasonable person and do not want to waste your time. However, the failure of your office to provide any explanation justifying your claims leaves me no alternative but to appeal the denial of my request.

I am anxious to learn how release of photographs that already have been published or listed by the U.S. Government "could reasonably be expected to interfere with enforcement proceedings" and "could reasonably be expected to constitute an unwarranted invasion of personal privacy," especially when the photographs, to the best of my knowledge, do not show any persons who are alive.

Sincerely,

/s/ ALLAN J. FAVISH
ALLAN J. FAVISH
Attorney at Law

Office of the Independent Counsel

1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688
Fax (202) 514-8802

February 19, 1997

Mr. Allan J. Favish
Attorney at Law
18645 Hatteras Street, #289
Tarzana, CA 91356-1802

Dear Mr. Favish:

I have completed my review of your appeal of this Office's denial of certain aspects of the FOIA request you made in January 6, 1997. Your appeal, specifying 10 categories of photographs, was received by this Office on January 28, 1997.

I have determined that the information to which your appeal related must be withheld pursuant to FOIA Exemption (b)(7)(A), which pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to interfere with enforcement proceedings, and (b)(7)(C), which provides protection for law enforcement information the disclosure of which could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Accordingly, the records you have requested are not appropriate for discretionary release and your appeal must be denied. In asserting Exemption (b)(7)(A) and (b)(7)(C) with respect to these records, this Office does

not waive its right or ability to assert other relevant exemptions if the case should arise. *See e.g., Young* v. *CIA*, 972 F.2d 536, 538-39 (4th Cir. 1992); *Guia* v. *Meese*, 699 F. Supp. 956, 959 n.2 (D.D.C. 1988).

Sincerely,

/s/ JOHN D. BATES
JOHN D. BATES
Deputy Independent Counsel

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

No. CV-97-1479-WDK (Ex)

ALAN J. FAVISH, PLAINTIFF

v.

OFFICE OF THE INDEPENDENT COUNSEL, DEFENDANT

ANSWER TO COMPLAINT FOR INJUNCTIVE
RELIED UNDER FREEDOM OF INFORMATION ACT

COMES NOW defendant Office of the Independent Counsel, by and through its undersigned counsel, and in answer to the individually numbered paragraphs of the plaintiff's Complaint admit, deny and allege as follows:

1. The allegations contained in Paragraphs 1 and 3 consist of plaintiff's characterization of this action or conclusions of law for which no answer is necessary, but insofar as answers may be deemed necessary, Paragraphs 1 and 3 are denied.

2. With regard to the allegations in Paragraph 2, the defendant is without sufficient information or knowledge to form a belief as to the truth of the allegations and on that basis denies the allegations contained in the first sentence of Paragraph 2. The defendant denies the second sentence of the paragraph, except to admit that defendant is an agency of the United States, established pursuant to the Ethics in Government Act

of 1978, 28 U.S.C. §§ 591-599, as reauthorized by the Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732.

3. With regard to the allegations in Paragraph 4, the defendant is currently without sufficient information or knowledge to form a belief as to the truth of the allegations and on that basis denies the allegations as certain photographs and documents cannot be identified from the copies that appear in the report published by the Senate Committee on Banking, Housing, and Urban Affairs, S. Hrg. 103-889. Defendant admits that defendant has in its possession some photographs.

4. With regard to the allegations contained in the first sentence of Paragraph 5, the defendant denies the allegations contained in the first sentence except to admit that defendant received a letter dated January 6, 1997 entitled "Freedom of Information Act Request" from Allan J. Favish, a copy of which is attached to the Complaint as Exhibit 1. Defendant avers that Exhibit 1 is the best evidence of what the plaintiff has requested and Exhibit 1 speaks for itself. With regard to the allegations contained in the second sentence of Paragraph 5, the defendant denies the allegations contained in the second sentence except to admit that a letter was sent from the defendant to Allan J. Favish dated January 24, 1997, a copy of which is attached to the Complaint as Exhibit 2. Defendant avers that Exhibit 2 is the best evidence of what and how the defendant responded to the plaintiff and Exhibit 2 speaks for itself.

5. With regard to the allegations contained in Paragraph 6, the defendant denies the allegations except to admit that defendant received a letter dated January 28, 1997 entitled "Freedom of Information Act Appeal"

from Allan J. Favish, a copy of which is attached to the Complaint as Exhibit 3. Defendant avers that Exhibit 3 is the best evidence of what the plaintiff has requested and Exhibit 3 speaks for itself.

6. With regard to the allegations contained in Paragraph 7, the defendant denies the allegations except to admit that a letter was sent from the defendant to Allan J. Favish dated February 19, 1997, a copy of which is attached to the Complaint as Exhibit 4. Defendant avers that Exhibit 4 is the best evidence of what and how the defendant responded to the plaintiff and Exhibit 4 speaks for itself.

7. The defendant denies the allegations contained in Paragraph 8 and 10.

8. With regard to the allegations in Paragraph 9, the defendant is without sufficient information or knowledge to form a belief as to the truth of the allegations and on that basis denies the allegations contained in Paragraph 9.

9. Any and all allegations of the Complaint not herein before answered are denied.

10. The defendant denies the plaintiff is entitled to the relief sought in any portion of the Complaint or to any part thereof, or to any relief whatsoever.

FIRST AFFIRMATIVE DEFENSE

The plaintiff fails to state a claim upon which relief can be granted.

WHEREFORE, the defendant prays that this action against it be dismissed with prejudice and that judgment be entered in its favor, and award the defendant its costs and such other relief as may be appropriate.

DATED: This 28th day of April, 1997.

NORA M. MANELLA
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

/s/ JAN L. LUYMES
JAN L. LUYMES
Assistant United States Attorney
Senior Litigation Counsel
Attorneys for Defendant

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 97-1479-WDK (Ex)

ALLAN J. FAVISH, PLAINTIFF

v.

OFFICE OF THE INDEPENDENT COUNSEL, DEFENDANT

DECLARATION OF DARRELL M. JOSEPH

I, Darrell M. Joseph, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am an Associate Independent Counsel in the Office of the Independent Counsel ("OIC") Kenneth W. Starr. I have held this position since November 5, 1997. One of my responsibilities is to review or supervise the review of OIC files in response to requests made under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"); and the Privacy Act, 5 U.S.C. § 552a, to determine whether such files contain records within the scope of a request and, if so, to ascertain what portions of those records can be made available to the requester.

2. The purpose of this declaration is to provide the Court with a *Vaughn* index for documents subject to plaintiff's FOIA request but withheld from disclosure, in accordance with *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); and *Wiener* v. *FBI*, 943 F.2d 972 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992). This declaration provides the Court and plaintiff with a narrative description of the material being withheld by OIC, which identifes each document

or portion thereof withheld, the statutory exemption claimed, and provides the justification for the assertion of FOIA exemptions used to withhold certain information contained in the records at issue.

3. This declaration consists of: (I) the relevant pre-litigation correspondence between plaintiff and OIC regarding plaintiff's FOIA request; (II) a description of the OIC's system of records searched pursuant to plaintiff's request; (III) a detailed explanation of the format used in this declaration for the justification of withheld or redacted materials; and (IV) the justifications for withheld or redacted materials.

4. Submitted with this declaration are the following exhibits. Exhibit I consists of copies of the relevant pre-litigation FOIA correspondence between plaintiff and OIC. Exhibit II consists of copies of the documents responsive to plaintiff's request, including redacted documents, where redactions were necessary. Exhibit III consists of narrative descriptions containing detailed identification and justification for each of OIC's withholdings.

I. HISTORY OF THE PROCESSING OF PLAINTIFF'S REQUEST

5(a). Set forth as Exhibits I-1 through I-4 to this declaration are copies of pre-litigation correspondence between plaintiff and OIC relating to plaintiff's FOIA request. Exhibit I-1 is the initial request from the plaintiff, dated January 6, 1997. Plaintiff seeks "[p]hotographs taken in connection with the investigation into the death of Vincent Foster." Plaintiff's letter specified what he described as ten categories of requested photographs. Exhibit I-2 is a copy of OIC's January 24, 1997 letter denying plaintiff's request,

pursuant to Exemptions 7(A) and 7(C) of the FOIA, 5 U.S.C. §§ 552(b)(7)(a) and 552(b)(7)(C), while reserving OIC's right to assert the applicability of other relevant exemptions, if warranted. Exhibit I-3 is a copy of plaintiff's appeal letter, dated January 28, 1997. Exhibit I-4 is a February 19, 1997 letter from John D. Bates, Deputy Independent Counsel, denying plaintiff's appeal, pursuant to Exemptions 7(A) and 7(C) of the FOIA, while reserving OIC's right to assert other applicable exemptions if the need should arise.

5(b). On October 10, 1997, Independent Counsel Kenneth W. Starr submitted his Report on the death of Vincent W. Foster, Jr. ("Report") to the United States Court of Appeals for the District of Columbia Circuit's Division for the purpose of Appointing Independent Counsels ("the Special Division").[1] By Order dated October 10, 1997, the Special Division permitted the Report to be released to the public. (In addition, an Appendix containing the comments or information submitted to the Special Division pursuant to 28 U.S.C. § 594 was released by the Special Division in the Special Division's Appendix.) Subsequent to the public release of the Report, OIC reviewed the documents responsive to plaintiff's request and, as a result of this review (and the fact that the investigation regarding Vincent Foster's death has been concluded), OIC is no longer asserting a (b)(7)(A) exemption to withhold information from the plaintiff. As I describe in detail below, certain limited information is being withheld pursuant to Exemptions (b)(3) or (b)(7)(C).

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[1] Vincent W. Foster, Jr. was Deputy Counsel to President Clinton. The Report concluded that Mr. Foster committed suicide by gunshot in Fort Marcy Park on July 20, 1993.

II. DESCRIPTION OF OIC's SYSTEM OF RECORDS SEARCHED AND RESULTS OF THE SEARCH

6(a). As noted above, plaintiff requested "photographs taken in connection with the investigation into the death of Vincent Foster," Exhibit I-1, and requested specific photographs which plaintiff attempted to identify in 10 categories. With the exception of categories 2 and 3, the plaintiff identified the photographs he sought as copies of certain photographs published in Volume II of *Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation—Washington, D.C. Phase*, 103d Cong. (1994) ("the Senate hearings Volume II"). In categories 2 and 3, the plaintiff did not correlate the photograph he sought with a specific photograph contained in the Senate hearings Volume II; instead the plaintiff sought the photographs listed on pg. 2112 of the Senate hearings volume II (which contains a photocopy of a Federal Bureau of Investigation "Receipt for Property Received/Returned/Released/ Seized" bearing certain handwriting listing certain photographs).

6(b). On August 5, 1994, after the enactment of the Independent Counsel Reauthorization Act of 1994, the Special Division appointed Kenneth W. Starr as Independent Counsel In re: Madison Guaranty Savings & Loan Association. The OIC was given jurisdiction to investigate and prosecute matters "relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc." Due to continuing questions about Mr. Foster's death, the relationship between Mr. Foster's death and the handling of documents (including Whitewater-related documents) from Mr. Foster's office after his death, and Mr. Foster's possible role or involvement in other events under investigation by the OIC, the OIC reviewed and analyzed evidence gathered during prior investigations of Mr. Foster's death and conducted further investigations. The photographs which the plaintiff requested were compiled for law enforcement purposes, including the investigation into the death of Mr. Foster. The photographs are maintained in the OIC's Washington, D.C. office. In response to the plaintiff's request, the OIC searched for potentially responsive material. The results of that search and the defendant's response to each category is set forth in detail in paragraph 6(c) below.

6(c). Following a photocopy of the plaintiff's FOIA request, Exhibit II contains each of the ten categories of photographs as listed by the plaintiff, and each category is numerically identified by tabs 1 through 10. In order to assist the Court, for each page in the Senate hearings Volume II which bore photograph(s) requested by the plaintiff, a copy of the Senate Report page first appears. When there were multiple photographs contained on a page in the Senate hearings Volume II, on the photocopy of the Senate page was added a legend "A," "B," "C," or "D" as was appropriate to each of the photographs. Following the page from the Senate hearings Volume II, there appears the photograph(s), identified by page and "A, B, C, or D". Thus, the Court and the plaintiff can easily correlate the released, withheld, or redacted photographs with what has been requested. Extreme care has been taken in the reproduction of the photographs. The following

contains a summary of the photographs released, withheld in full, or withheld in part:

(1) As to Category 1, which requests photographs of a gun published on pages 2406-2412 and 2436 of Senate hearings Volume II:

4 photographs are released in full from page 2406;

4 photographs are released in full from page 2407;

4 photographs are released in full from page 2408;

4 photographs are released in full from page 2409;

4 photographs are released in full from page 2410;

4 photographs are released in full from page 2411;

4 photographs are released in full from page 2412; and Page 2436 (which contains a picture of a gun superimposed upon a handwritten document) is being released in full.

(2) As to Category 2, which requests "the photograph of a gun alleged to be of Mr. Foster's hand with a gun still in it" and as to which plaintiff has stated "this photograph appears to be the first Polaroid listed among the set of eight listed at the bottom of page 2112" of Senate hearings Volume II:

the defendant's response is found as part of defendant's response to request for Polaroid 1 from bottom section of page 2112, located in Tab 3. (It is being withheld in full pursuant to the (b)(7)(C) exemption.)

(3) As to Category 3, which requests the photographs listed on page 2112 of Senate hearings Volume

II, as noted above, this page is a photocopy of an Federal Bureau of Investigation "Receipt for Property Received/Returned/Released/Seized" bearing certain handwriting listing certain photographs. In Tab 3, a photocopy of the Receipt is reproduced. The listing of Polaroid photographs is broken into three sections: the top section which refernces 5 Polaroids, the middle section which references 5 Polaroids, and the bottom section which reference 8 Polaroids.

(I) As to the top section, the defendant is releasing in full the first Polaroid ("rear of cannon"), and the second Polaroid ("heavily foliaged area"). The third, fourth, and fifth Polaroids are being withheld in full pursuant to the (b)(7)(C) exemption.

(ii) As to the middle section, the defendant is releasing in full the first Polaroid ("driver seat"), the second Polaroid ("rear seat - driver side"), the third Polaroid ("read seat - passenger side"), and the fifth Polaroid ("rear of vehicle").

(iii) As to the bottom section, the defendant is withholding in full the 8 Polaroids pursuant to the (b)(7)(C) exemption.

(4) As to Category 4, which requests photographs of a gun and accompanying materials published on pages 2395-2399 of Senate hearings Volume II:

2 photographs are released in full from page 2395;

3 photographs (or their backs)[2] are released in full from page 2396;

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[2] When the photograph contained in the Senate hearing volume was the back of a photograph, the backs of the photograph were reproduced in Exhibit II to the extent that they could be

3 photographs (or their backs) are released in full from page 2397;

3 photographs (or their backs) are released in full from page 2398; and

3 photographs (or their backs) are released in full from page 2399.

(5) As to Category 5, which requests photographs published on pages 2388-2391 of Senate hearings Volume II:

3 photographs are released in full from page 2388; the back of 3 photographs are released in part from page 2389 and certain information is being withheld frm 2389A, 2389B, and 2389C pursuant to Exemption (b)(3);

2 photographs are released in full from page 2390; and the backs of 2 photographs are released in part from page 2391 and certain information is being withheld from 2391A and 2391B pursuant to Exemption (b)(3).

(6) As to Category 6, which requests photographs published on page 2392 of Senate hearings Volume II:

2 photographs are released in full from page 2392.

(7) As to Category 7, which requests photographs published on pages 2393-2394 of Senate hearings Volume II:

the backs of 3 Polaroids are released in part from page 2393 and certain information is being withheld

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identified. The plaintiff was asked whether he still wanted to have the backs of photographs produced and he indicated that he did.

from 2393A, 2393B, and 2393C pursuant to Exemption (b)(3); and the backs of 2 Polaroids are released in part from page 2394 and certain information is being withheld from 2394A and 2394B pursuant to Exemption (b)(3).

(8) As to Category 8, which requests photographs published on pages 2399-2405 of Senate hearings Volume II:

3 photographs are released in full from page 2399;

2 photographs are released in full from page 2400 and certain information is being withheld from photographs 2400C and 2400D pursuant to Exemption (b)(7)(C);

2 photographs are released in full from page 2401 and certain information is being withheld from photographs 2401A and 2401B pursuant to Exemption (b)(7)(C);

Certain information is being withheld from photographs 2402A, 2402B, 2402C and 2402D pursuant to Exemption (b)(7)(C);

2 photographs are released in full from page 2403, and certain information is being withheld from photographs 2403A and 2403B pursuant to Exemption (b)(7)(C);

4 photographs are released in full from page 2404; and

4 photographs are released in full from page 2405.

(9) As to Category 9, which requests photographs published on pages 2413-2424 of Senate hearings Volume II:

4 photographs are released in full from page 2413;

4 photographs are released in full from page 2414;

2 photographs are released in full from page 2415 and certain information is being withheld from photographs 2415C and 2415D pursuant to Exemption (b)(7)(C);

4 photographs are released in full from page 2416;

4 photographs are released in full from page 2417;

4 photographs are released in full from page 2418;

4 photographs are released in full from page 2419;

4 photographs are released in full from page 2420;

4 photographs are released in full from page 2421;

2 photographs are released in full from page 2422 and certain information is being withheld from photographs 2422A and 2422B pursuant to Exemption (b)(7)(C);

4 photographs are released in full from page 2423; and

4 photographs are released in full from page 2424.

(10) As to Category 10, which requests photographs published on pages 2425-2428 of Senate hearings Volume II:

Each page contained in Senate hearings Volume II at 2425-2428 contains the copy of the backs of 2 photographs, for a total of the backs of 8 photographs. After extensive comparison, it is not possible to definitively match the backs of photographs with the backs as photocopied in the Senate hearings Volume II. Therefore, all 8 backs appear in Tab 10 without a page correlation. As to each of the backs, certain information has been withheld from each of the 8 backs pursuant to the (b)(3) exemption.

6(d). In summary, a total of 118 photographs or Polaroids (or their backs) have been released in full, 11 Polaroids have been withheld in full pursuant to the (b)(7)(C) exemption, information from 18 photographs (or their backs) has been withheld pursuant to the (b)(3) exemption, and information from 14 photographs (or their backs) has been withheld pursuant to the (b)(7)(C) exemptions.

III. EXPLANATION OF FORMAT USED FOR JUSTIFICATION OF WITHHELD MATERIAL

7. For the Court's information, I thoroughly reviewed the responsive photographs described in paragraph 6, above. As noted, portions of certain photographs or backs of photographs, and certain photographs in their entirety, are being withheld by OIC pursuant to one of two FOIA exemptions: (b)(3) and (b)(7)(C). The categories, which are described below, describe the statutory exemption asserted, the rationale for claiming the exemption, and the subject matter of the asserted exemptions. Copies of the redacted records (*see* Exhibit II) are labeled with the relevant coded categories of exemptions. The coded categories identify the nature of the information withheld under

FOIA. In addition, OIC has provided a separate narrative description (*see* Exhibit III) identifying each document or portion thereof being withheld, the exemption claimed, and the justification for withholding the information.

8. A summary of the exemption categories is provided below:

Category (b)(3)	Records Specifically Exempted from Disclosure by Statute
Category (b)(7)(C)	Records or Information Compiled for Law Enforcement Purposes which could Reasonably be Expected to Constitute an Unwarranted Invasion of Personal Privacy

9. Exemptions claimed by OIC fall into two categoriesA: (b)(3) and (b)(7)(C). The narrative descriptions for the information being withheld are found in Exhibit III. The narrative descriptions (which also refer back to paragraphs in this declaration) and coded categories are being used to aid the Court's review of OIC's explanations or FOIA exemptions used to withhold the protected material. Describing the information withheld by OIC in more detail, in this declaration and in the narrative descriptions in Exhibit III, could identify the material OIC seeks to protect. No reasonably segregable, non-exempt portions have been withheld from the plaintiff. Accordingly, all information withheld is exempt from disclosure pursuant to a FOIA exemption.

IV. JUSTIFICATION FOR WITHHELD MATERIALS

10. Plaintiff is being provided with the maximum disclosure authorized by law. This specific FOIA exemptions under which information was withheld by OIC are discussed below.

(A) Title 5 U.S.C. § 552(b)(3). Information Specifically Exempted from Disclosure By Statute.

11. Title 5 U.S.C. § 552(b)(3) allows the withholding of information specifically exempted from disclosure by statute if such exempting statute "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

12. Fed. R. Crim. P. 6(e), which prohibits the disclosure of "matters occurring before the grand jury," is an exempting statute within the meaning of Exemption (b)(3) of the FOIA. The investigations conducted into the death of Mr Foster included, among other things, the adducing of evidence before the federal grand jury in Washington, D.C. *See* Report at 2.

13. Information relating to matters before the grand jury has been redacted from the backs of certain photographs, pursuant 2426A; 2426B; 2427A; 2427B; 2428A; 2428B.)[3] Disclosure of the withheld information

[3] It should be noted that the information being withheld from the backs of these identified photographs pursuant to Exemption (b)(3) was not affixed to the photographs at the time of the Senate hearings. To the extent that the plaintiff has requested the photographs as they existed in the Senate hearings Volume II, the information was not in existence at that time and therefore the

would reveal what evidence was presented to the grand jury.

(B) Title 5 U.S.C. § 552(b)(7)(C). Records or Information Compiled for Law Enforcement Purposes which Could Reasonably be Expected to Constitute an Unwarranted Invasion of Personal Privacy.

14. Title 5 U.S.C. § 552(b)(7)(C) exempts from release records or information compiled for law enforcement purposes, disclosure of which reasonably could be expected to constitute an unwarranted invasion of personal privacy.

15. In asserting this exemption, the withheld information was evaluated to determine the nature and strength of the privacy interest of any individual whose name and/or identifying data appears in the photographs at issue. In withholding the information, the individual's privacy interest was balanced against the public's interest in disclosure. In each instance where information was withheld, it was determined that the individual did have a privacy interest and that the individual's privacy interests were not outweighed by any public interest in disclosure. Disclosure of names and identifying information and data relating to third parties would not shed light on how the government performs its statutory duties. When the documents at issue were reviewed for purposes of preparing this declaration, the passage of time and any effect on third-party privacy interests were considered. It was determined that the privacy interests are as strong—if not stronger—now than when the records were created. To reveal names and other personal identifying infor-

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information being withheld is outside the scope of the plaintiff's FOIA request.

mation in the context of these records could reasonably be expected to cause embarrassment, potential harassment and emotional anguish.

16. Exemption (b)(7)(C) was asserted to withhold the names and identifying information of third parties (Foster family and non- family members) who were not the subject of investigation in Document Nos. 2400C; 2400D; 2401A; 2401B; 2415C; 2415D. The names and identifying information were withheld to protect the relevant individuals from unnecessary harassment, nuisance and emotional and mental anguish. The identification of these individuals, particularly in connection with Mr. Foster's death, could cause them embarrassment, humiliation or unwarranted public attention. Disclosure of this information would, thus, result in an unwarranted invasion of those individuals' personal privacy.

17. Exemption (b)(7)(C) was also asserted to withhold nine (9) post-mortem photographs of Mr. Foster's face and/or body. OIC invokes the same exemption to withhold one (1) photograph depicting, post-mortem, Mr. Foster's right hand clutching a gun; and one (1) photograph of Mr. Foster's eyeglasses, lying on the ground near his body. Thus, a total of eleven (11) photographs are being withheld in full pursuant to Exemption (b)(7)(C). These photographs sought by the plaintiff are graphic, explicit, and extremely upsetting. The privacy interest being asserted is that of Vincent Foster's family members. Disclosure of the foregoing photographs would cause Mr. Foster's surviving family members a great deal of anguish well beyond that which they have already suffered, and thus would constitute an unwarranted invasion of their personal privacy. (*See* Document No. 2112, Top Section, Polaroid

Nos. 3-5; Document No. 2112, Bottom Section, Polaroid Nos. 1-8).

18. Finally, Exemption (b)(7)(C) was asserted to withhold from eight photographs certain matter pertaining to Foster family members. (*See* Document Nos. 2402A; 2402B; 2402C; 2402D; 2403A; 2403B; 2422A; 2422B.) Disclosure of these items in the form called for by Mr. Favish's FOIA request would cause Mr. Foster's surviving family members additional anguish, and thus, as is the case with the material described in paragraph 17, above, would constitute an unwarranted invasion of their personal privacy.

I declare under penalty of perjury the foregoing information is true and correct to the best of my knowledge and belief.

Dated this 2d day of January, 1998, at the Office of the Independent Counsel, Washington, D.C.

/s/ DARREL M. JOSEPH
DARRELL M. JOSPEH
Associate Independent Counsel

EXHIBIT III

* * * * *

Exhibit: II, Tab 3

Document: 2112, Top Section, Polaroid 3

Date of Document: Not applicable

Total Number of pages: 1

Type of Document: Photograph

Nature of Withholding: Withheld in Entirety

The material withheld is a photograph of Mr. Foster's body in Fort Marcy Park. Disclosure of this photograph would cause Mr. Foster's surviving family members a great deal of anguish and reasonably can be expected to constitute an unwarranted invasion of their personal privacy. The disclosure of this graphic picture would shed no light on how the government performs it[s] statutory duties. The material therefore is exempt from disclosure under FOIA Exemption (b)(7)(C). (*See* Joseph Decl. ¶¶ 15, 17.)

Exhibit: II, Tab 3

Document: 2112, Top Section, Polaroid 4

Date of Document: Not applicable

Total Number of pages: 1

Type of Document: Photograph

Nature of Withholding: Withheld in Entirety

The material withheld is a photograph of Mr. Foster's body in Fort Marcy Park. Disclosure of this photograph would cause Mr. Foster's surviving family members a great deal of anguish and reasonably can be expected to constitute an unwarranted invasion of their personal privacy. The disclosure of this graphic picture would shed no light on how the government performs it[s] statutory duties. The material therefore is exempt from disclosure under FOIA Exemption (b)(7)(C). (*See* Joseph Decl. ¶¶ 15, 17.)

Exhibit: II, Tab 3

Document: 2112, Top Section, Polaroid 5

Date of Document: Not applicable

Total Number of pages: 1

Type of Document: Photograph

Nature of Withholding: Withheld in Entirety

The material withheld is a photograph of Mr. Foster's body in Fort Marcy Park. Disclosure of this photograph would cause Mr. Foster's surviving family members a great deal of anguish and reasonably can be expected to constitute an unwarranted invasion of their personal privacy. The disclosure of this graphic picture would shed no light on how the government performs it[s] statutory duties. The material therefore is exempt from disclosure under FOIA Exemption (b)(7)(C). (*See* Joseph Decl. ¶¶ 15, 17.)

Exhibit: II, Tabs 2 and 3

Document: 2112, Bottom Section, Polaroid 1

Date of Document: Not applicable

Total Number of pages: 1

Type of Document: Photograph

Nature of Withholding: Withheld in Entirety

The material withheld is a photograph of Mr. Foster's right hand. In his hand is a gun. Disclosure of this photograph would cause Mr. Foster's surviving family members a great deal of anguish and reasonably can be expected to constitute an unwarranted invasion of their personal privacy. The disclosure of this graphic picture would shed no light on how the government performs it[s] statutory duties. The material is therefore exempt from disclosure under FOIA Exemption (b)(7)(C). (*See* Joseph Decl. ¶¶ 15, 17.)

* * * * *

Exhibit: II, Tab 3

Document: 2112, Bottom Section, Polaroid 3

Date of Document: Not applicable

Total Number of pages: 1

Type of Document: Photograph

Nature of Withholding: Withheld in Entirety

The material withheld is a photograph of Mr. Foster's body in Fort Marcy Park. Disclosure of this photograph would cause Mr. Foster's surviving family members a great deal of anguish and reasonably can be expected to constitute an unwarranted invasion of their personal privacy. The disclosure of this graphic picture would shed no light on how the government performs its statutory duties. The material therefore is exempt from disclosure under FOIA Exemption (b)(7)(C). (*See* Joseph Decl. ¶¶ 15, 17.)

Exhibit: II, Tab 3

Document: 2112, Bottom Section, Polaroid 4

Date of Document: Not applicable

Total Number of pages: 1

Type of Document: Photograph

Nature of Withholding: Withheld in Entirety

The material withheld is a photograph of Mr. Foster's body in Fort Marcy Park. Disclosure of this photograph would cause Mr. Foster's surviving family members a great deal of anguish and reasonably can be expected to constitute an unwarranted invasion of their personal privacy. The disclosure of this graphic picture would shed no light on how the government performs its statutory duties. The material therefore is exempt from disclosure under FOIA Exemption (b)(7)(C). (*See* Joseph Decl. ¶¶ 15, 17.)

Exhibit: II, Tab 3

Document: 2112, Bottom Section, Polaroid 5

Date of Document: Not applicable

Total Number of pages: 1

Type of Document: Photograph

Nature of Withholding: Withheld in Entirety

The material withheld is a photograph of Mr. Foster's body in Fort Marcy Park. Disclosure of this photograph would cause Mr. Foster's surviving family members a great deal of anguish and reasonably can be expected to constitute an unwarranted invasion of their personal privacy. The disclosure of this graphic picture would shed no light on how the government performs its statutory duties. The material therefore is exempt from disclosure under FOIA Exemption (b)(7)(C). (*See* Joseph Decl. ¶¶ 15, 17.)

Exhibit: II, Tab 3

Document: 2112, Bottom Section, Polaroid 6

Date of Document: Not applicable

Total Number of pages: 1

Type of Document: Photograph

Nature of Withholding: Withheld in Entirety

The material withheld is a photograph of Mr. Foster's body in Fort Marcy Park. Disclosure of this photograph would cause Mr. Foster's surviving family members a great deal of anguish and reasonably can be expected to constitute an unwarranted invasion of their personal privacy. The disclosure of this graphic picture would shed no light on how the government performs its statutory duties. The material therefore is exempt from disclosure under FOIA Exemption (b)(7)(C). (*See* Joseph Decl. ¶¶ 15, 17.)

Exhibit: II, Tab 3

Document: 2112, Bottom Section, Polaroid 7

Date of Document: Not applicable

Total Number of pages: 1

Type of Document: Photograph

Nature of Withholding: Withheld in Entirety

The material withheld is a photograph of Mr. Foster's body in Fort Marcy Park. Disclosure of this photograph would cause Mr. Foster's surviving family members a great deal of anguish and reasonably can be expected to constitute an unwarranted invasion of their personal privacy. The disclosure of this graphic picture would shed no light on how the government performs its statutory duties. The material therefore is exempt from disclosure under FOIA Exemption (b)(7)(C). (*See* Joseph Decl. ¶¶ 15, 17.)

Exhibit: II, Tab 3

Document: 2112, Bottom Section, Polaroid 8

Date of Document: Not applicable

Total Number of pages: 1

Type of Document: Photograph

Nature of Withholding: Withheld in Entirety

The material withheld is a photograph of Mr. Foster's body in Fort Marcy Park. Disclosure of this photograph would cause Mr. Foster's surviving family members a great deal of anguish and reasonably can be expected to constitute an unwarranted invasion of their personal privacy. The disclosure of this graphic picture would shed no light on how the government performs its statutory duties. The material therefore is exempt from disclosure under FOIA Exemption (b)(7)(C). (*See* Joseph Decl. ¶¶ 15, 17.)

* * * * *

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV-97-1479-WDK (Ex)

ALAN J. FAVISH, PLAINTIFF

v.

OFFICE OF THE INDEPENDENT COUNSEL, DEFENDANT

SUPPLEMENTAL DECLARATION OF DARRELL M. JOSEPH

I, Darrell M. Joseph, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am an Associate Independent Counsel in the Office of the Independent Counsel ("OIC") Kenneth W. Starr. I have held this position since November 5, 1997. One of my responsibilities is to review or supervise the review of OIC files in response to requests made under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"); and the Privacy Act, 5 U.S.C. § 552a, to determine whether such files contain records within the scope of a request and, if so, to ascertain what portions of those records can be made available to the requester.

2. The purpose of this declaration is to correct a word processing error which was just noted as to paragraph 13 of my Declaration filed on January 5, 1998. In re-reading paragraph 13 (beginning at page 14 and continuing onto the top of page 15), it became clear that two lines (which had appeared in the text which I had written) were lost during the final printing of my

Declaration. The two lines which are missing (and which should have appeared after the last word on page 14) identify exemption being asserted and identify other documents (in addition to those listed on page 15) in which a (b)(3) exemption was asserted. Paragraph 13 should read:

13. Information relating to matters before the grand jury has been redacted from the backs of certain photographs, pursuant to FOIA Exemption (b)(3). (*See* Document Nos. 2389A; 2389B; 2389C; 2391A; 2391B; 2393A; 2393B; 2393C; 2394A; 2394B; 2425A; 2425B; 2426A; 2426B; 2427A; 2427B; 2428A; 2428B.)[3] Disclosure of the withheld information would reveal what evidence was presented to the grand jury.

I declare under penalty of perjury the foregoing information is true and correct.

Dated this 22nd day of January, 1998, at the Office of the Independent Counsel, Washington, D.C.

/s/ DARRELL M. JOSEPH
DARRELL M. JOSEPH
Associate Independent Counsel

[3] It should be noted that the information being withheld from the backs of these identified photographs pursuant to Exemption (b)(3) was not affixed to the photographs at the time of the Senate hearings. To the extent that the plaintiff has requested the photographs as they existed in the Senate hearings Volume II, the information was not in existence at that time and therefore the information being withheld is outside the scope of the plaintiff's FOIA request.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CV 97-1479-WDK(Ex)

ALLAN J. FAVISH, PLAINTIFF

v.

OFFICE OF THE INDEPENDENT COUNSEL, DEFENDANT

Filed: February 11, 1998

STIPULATION TO DISMISS WITH PREJUDICE CLAIMS AS TO INFORMATION WITHHELD PURSUANT TO EXEMPTION (b)(3) AND CLAIMS AS TO CERTAIN INFORMATION WITHHELD PURSUANT TO (b)(7)(C) AND IDENTIFICATION OF WHAT REMAINS AT ISSUE; ORDER THEREON

COMES NOW plaintiff Allan J. Favish, who appears in propria persona, and defendant Office of the Independent Counsel, by and through the undersigned counsel, who stipulate, and respectfully request the Court to so order, that all of plaintiff's claims as to all information withheld pursuant to 5 U.S.C. § 552(b)(3) ("Exemption (b)(3)") [which information is located in photographs identified in this action in Category 5 as Documents 2389A, 2389B, 2389C, 2391A, 2391B, in Category 7 as Documents 2393A, 2393B, 2393C, 2394A, 2394B, and all of the Documents in Category 10, which

were identified as Documents 2425A, 2425B, 2426A, 2426B, 2427A, 2427B, 2428A, 2428B] and the plaintiff's claims as to information withheld pursuant to 5 U.S.C. § 552(b)(7)(C) ("Exemption (b)(7)(C)") [which information is located in photographs identified in this action in Category 8 as Documents 2400C, 2400D, 2401A, 2401B, 2402A, 2402B, 2402C, 2402D, 2403A, 2403B, and in Category 9 as Documents 2415C, 2415D, 2422A, 2422B] be dismissed with prejudice.

To assist the Court, the parties hereby identify the Documents which the plaintiff still contests: the photographs (withheld in their entireties) identified in this action in Category 3 in Document 2112, Top Section, Polaroids 3, 4 and 5 and in Document 2112, Bottom Section, Polaroids 1, 2, 3, 4, 5, 6, 7, and 8. These photographs are being withheld in their entireties pursuant to 5 U.S.C. § 552(b)(7)(C). With regard to these photographs, the parties stipulate that these photographs were compiled for law enforcement purposes (the threshold requirement for a (b)(7) exemption). The only issue left to be resolved with regard to this exemption is whether the disclosure of these photographs could reasonably be expected to constitute an unwarranted invasion of personal privacy. In addition, for all unredacted portions of photos released by defendant, plaintiff claims that defendant is required to produce color copies of those uredacted portions if they were originally in color. While the defendant does not agree that this is an appropriate issue, plaintiff reserves this as an issue to be litigated.

DATED: This 5th day of February, 1998.

/s/ ALLAN J. FAVISH
ALLAN J. FAVISH
Plaintiff in propria persona

DATED: This 9th day of February, 1998.

NORA M. MANELLA
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

/s/ JAN L. LUYMES
JAN L. LUYMES
Assistant United States Attorney
Senior Litigation Counsel
Attorneys for Defendant

ORDER

IT IS SO ORDERED that all of plaintiff's claims in this action as to all information withheld pursuant to 5 U.S.C. § 552(b)(3) (which information is located in photographs identified in this action in Category 5 as Documents 2389A, 2389B, 2389C, 2391A, 2391B, in Category 7 as Documents 2393A, 2393B, 2393C, 2394A, 2394B, and all of the Documents in Category 10, which were identified as Documents 2425A, 2424B, 2426A, 2426B, 2427A, 2427B, 2428A, 2428B), and the plaintiff's claims as to information withheld pursuant to 5 U.S.C. § 552(b)(7)(C) (which information is located in photographs identified in this action in Category 8 as Documents 2400C, 2400D, 2401A, 2401B, 2402A, 2402B, 2402C, 2402D, 2403A, 2403B, and in Category 9 as Documents 2415C, 2415D, 2422A, 2422B) are hereby dismissed with prejudice.

Dated: This 11th day of Feb., 1998.

/s/ WILLIAM D. KELLER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(WESTERN DIVISION)

No.

ALLAN J. FAVISH, PLAINTIFF

SHEILA FOSTER ANTHONY; LISA FOSTER MOODY, INTERVENORS

v.

OFFICE OF INDEPENDENT COUNSEL, DEFENDANT

AMENDED DECLARATION OF LISA FOSTER MOODY

My name is Lisa Foster Moody. I was married to Vincent W. Foster, Jr. for 25 years until he committed suicide on July 20, 1993.

His death and the manner in which he died totally devastated our family. Having to deal with all the media attention was incredibly difficult. Indeed, there have been telephone calls from the press and reporters knocking on my door as recently as last summer. If these photographs are released, we will again be thrust in the public eye and forced to endure the pain and invasion of privacy all over again.

There have been five major investigations of Vince's death—by the Park Police, by two independent counsels, Robert Fiske and Kenneth Starr, and by two congressional committees chaired by Rep. Clinger and Sen. D'Amato. I personally appeared for interviews in

Washington D. C. for three of these investigations. My children, Vincent III, Laura and Brugh, also flew to Washington from Little Rock to be questioned individually by Kenneth Starr, his team of investigators and several FBI agents. All of these investigations ended with the same conclusion—that Vince committed suicide. The family cooperated fully with these investigations. From the moment I was told that he had killed himself, I have never had any doubts about his suicide.

Now that the investigations are concluded, my family is in the process of healing and restoring our lives to some degree of normalcy. I have remarried and my husband and I are seeking to meld our families into one. We do not need the set back that release of the photos would cause and frankly we do not deserve it. We have generally dealt with our grief in private and have declined all of the many requests for television interviews. The privacy we have sought to maintain has been our salvation. I beg the Court not to destroy what we have worked so hard to accomplish by releasing graphic photographs of Vince in response to what we consider a cruel, insensitive request that we believe is unsupported by any valid public interest.

I did not even open Vince's casket for fear of seeing him distorted by the autopsy. I surely cannot bear seeing him lying on the ground in Fort Marcy Park with blood stains on him, coupled with the indignity of the whole world's viewing these pictures in tabloids or on the Internet. My understanding of the photographs is that all of them would be extremely upsetting to the family and cause us no end of pain and sorrow. The shock of seeing the picture of Vince on the television with the gun in his hand is still a horrifying memory for me. It is inconceivable to me how the misguided,

twisted curiosity of a stranger could justify my children having to see pictures of their dead father on the nightly news, on the Internet and on the supermarket shelves.

I respectfully implore the Court to be sensitive to the wishes of the members of our family and our wholly-legitimate privacy concerns and to reconsider releasing these photographs.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on Feb. 7, 2001, at Pulaski County, Arkansas

/s/ LISA FOSTER MOODY
Lisa Foster Moody

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(WESTERN DIVISION)

No.

ALLAN J. FAVISH, PLAINTIFF

SHEILA FOSTER ANTHONY; LISA FOSTER MOODY, INTERVENORS

v.

OFFICE OF INDEPENDENT COUNSEL, DEFENDANT

AMENDED DECLARATION OF SHEILA FOSTER ANTHONY

I am the sister of Vincent Foster who took his life on July 20, 1993. I have read the Court's January 12, 2001 decision and order in *Allan J. Favish v. Office of Independent Counsel*, CV 97-1478-WDK, listing the photographs it intends to release. More than ever before, I fervently believe that releasing any photographs depicting Vince's body post-mortem would constitute a painful unwarranted invasion of my privacy, my mother's privacy, my sister's privacy, and the privacy of Lisa Foster Moody (Vince's widow), her three children, and other members of the Foster family.

Our family has suffered a great loss under extremely tragic circumstances, compounded by the barrage of newspaper, magazine, and Internet articles, books, and television programs and reports that followed Vince's death. An intensely private matter drew national

attention. Reporters, as well as simply curious individuals, harassed my grieving family in unbelievably insensitive ways. Conspiracy theorists imagined and caused to be printed and published all sorts of wild and unsubstantiated stories, alleging murder, treason, Swiss Bank accounts, high-level and widespread cover-up of government wrongdoing, and other such ravings. Political and commercial opportunists used Vince's death to publish films and articles through media of tabloids, video, and on the Internet to speculate about and sensationalize his tragic suicide and to profit from it. Seemingly countless official investigations of his death ensued, and my sister and I, as well as Vince's wife and children, were called before government agents to be interviewed and to testify about, and painfully re-live, the events surrounding his death. My now 86 year old mother and my sister received middle-of-the-night calls from authors pretending to be Vince's friend and seeking any personal tidbit of information about Vince from them. We found flowers on his grave with handwritten notes from strangers asserting that he had been murdered. I was sent a book authored by a conspiracy theorist who stated that Vince had been murdered and warned that my life could be in danger.

Our family was horrified and devastated by the photograph leaked to the press and published on a national television network and in newspapers of Vince's dear dead hand holding the gun he used to kill himself. That photograph has been shown in national media again and again, and every time I see it I have nightmares and heart-pounding insomnia as I visualize how he must have spent his last few minutes and seconds of his life. My mother has suffered unimaginable sorrow and depression in losing her only son, but

her grief (and ours) has been compounded by the fear that she will see upsetting reports, about him on her television set or see headlines and photographs in the tabloids on the grocery store racks where she shops. It is my ardent desire to protect my family as well as myself from additional torment which would result from the release of these graphic photographs.

I fear that the release of these photographs certainly would set off another round of intense scrutiny by the media. Undoubtedly, the photographs would be placed on the Internet for world consumption. Once again my family would be the focus of conceivably unsavory and distasteful media coverage. I cannot adequately express how truly unjust, unfair and cruel it would be to subject my family to more public scrutiny and the dissemination of these photographs via the Internet or by other print and electronic media. Although I have struggled to read the description of the photographs at issue here, I could not bring myself to view them. The horror of actually seeing Vince's dead body and bloody face and shirt would undoubtedly cause me extreme mental anguish. No member of my family should ever be concerned with the possible exposure of photographs of this nature.

The death of my brother has been more than adequately investigated. Five separate government inquiries have determined that Vince's death was a result of a self-inflicted gun wound. Therefore, I cannot fathom a legitimate or rational reason why these photographs should be released. The mere suggestion that these photographs would be released is unconscionable. Their release would only bring more agony to my family.

We have endured enough pain and personal invasion by the media and by those who investigated the death of my brother. While I have tried here, I have no adequate words to express the anguish the release of these photographs would bring to me and the entire Foster family.

The Government has asked the Court to uphold its position that the release of the photographs would be an unwarranted invasion of my personal privacy and that of Vince's family. I implore the Court to do all it can to protect our family, but particularly Vince's children and his 86 year old mother, from further invasion and the distressing events that surely would result from the release of these photographs. Indeed, I beg the Court to place these photographs under permanent seal so that we will not continually, in forum after forum, be required to hire legal counsel and make these requests to the courts.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on Feb. 9, 2001, at Washington, DC

/s/ SHEILA FOSTER ANTHONY
Sheila Foster Anthony

UNDER SEAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division (94-1) for the Purpose of
Appointing Independent Counsels

REPORT ON THE DEATH OF
VINCENT W. FOSTER, JR.,
BY THE OFFICE OF INDEPENDENT COUNSEL
IN RE: MADISON GUARANTY SAVINGS & LOAN
ASSOCIATION

Filed for Comments:
July 15, 1997

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UNDER SEAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division (94-1) for the Purpose of
Appointing Independent Counsels

REPORT ON THE DEATH OF VINCENT W. FOSTER, JR., BY THE OFFICE OF INDEPENDENT COUNSEL IN RE: MADISON GUARANTY SAVINGS & LOAN ASSOCIATION

I. INTRODUCTION

In accordance with 28 U.S.C. § 594(h), the Office of Independent Counsel In re: Madison Guaranty Savings & Loan Association (the OIC) files this summary report on the 1993 death of Deputy White House Counsel Vincent W. Foster, Jr.

On July 20, 1993, police and rescue personnel were called to Fort Marcy Park in suburban Northern Virginia. They found Mr. Foster lying dead with a gun in his right hand and gunshot residue-like material on that hand. There were no signs of a struggle. There was a gunshot wound through the back of his head and blood under his head and back. The autopsy determined that Mr. Foster's death was caused by a gunshot through the back of his mouth exiting the back of his

head. The autopsy revealed no other wounds on Mr. Foster's body.

The police later learned that Mr. Foster had called a family doctor for antidepressant medication the day before his death. He had told his sister four days before his death that he was depressed, and she had given him the names of three psychiatrists. He had written in the days or weeks before his death that he "was not meant for the job or the spotlight of public life in Washington. Here, ruining people is considered sport."

Two law enforcement investigations—the initial United States Park Police investigation and a subsequent investigation conducted under the direction of regulatory Independent Counsel Robert B. Fiske, Jr.—concluded that Mr. Foster committed suicide by gunshot in Fort Marcy Park. Two inquiries in the Congress of the United States reached the same conclusion. After analysis of the evidence gathered during those investigations, and further investigation including adducing evidence before the federal grand jury in Washington, D.C., the OIC likewise has concluded that Mr. Foster committed suicide by gunshot in Fort Marcy Park.

The OIC's conclusion is based on analyses and conclusions of a number of experienced experts and criminal investigators retained by the OIC. They include Dr. Brian D. Blackbourne, a forensic pathologist who is the Medical Examiner for San Diego County, California; Dr. Henry C. Lee, an expert in physical evidence and crime scene reconstruction who is Director of the Connecticut State Police Forensic Science Laboratory; Dr. Alan L. Berman, an expert suicidologist who currently is Executive Director of the American Association of Suicidology; and several experienced

investigators with extensive service in the Federal Bureau of Investigation (FBI) and other law enforcement agencies. These experts and investigators reviewed the evidence gathered during the prior investigations and conducted further investigation as necessary.

Dr. Blackbourne concluded that "Vincent Foster committed suicide on July 20, 1993 in Ft. Marcy Park by placing a .38 caliber revolver in his mouth and pulling the trigger. His death was at his own hand."[1] Dr. Lee reported that "[a]fter careful review of the crime scene photographs, reports, and reexamination of the physical evidence, the data indicate that the death of Mr. Vincent W. Foster, Jr. is consistent with a suicide. The location where Mr. Foster's body was found is consistent with the primary scene," that is, the location where he committed suicide.[2] Dr. Berman stated that "[i]n my opinion and to a 100% degree of medical certainty, the death of Vincent Foster was a suicide. No plausible evidence has been presented to support any other conclusion."[3] OIC investigators concurred, based on investigation and analysis of the evidentiary record, that Mr. Foster committed suicide by gunshot in Fort Marcy Park.

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[1] Report to the Office of the Independent Counsel Concerning the Death of Vincent Foster, submitted by Dr. Brian D. Blackbourne, M.D., at 5 (Blackbourne Report).

[2] Forensic Report to the Independent Counsel In Re Vincent W. Foster, Jr., submitted by Dr. Henry C. Lee, Ph.D., at 495 (Lee Report).

[3] Report to the Office of Independent Counsel, submitted by Dr. Alan L. Berman, Ph.D., at 15 (Berman Report).

II. BACKGROUND

A. 1993 Park Police Investigation

Because Mr. Foster's body was found in Fort Marcy, a park maintained by the National Park Service, the United States Park Police conducted the investigation of his death.[4] On the night of the death (July 20, 1993), Mr. Foster's body was transported to Fairfax County Hospital in Fairfax, Virginia. The next day, Dr. James C. Beyer, Deputy Chief Medical Examiner, Northern Virginia District of the Virginia Office of the Chief Medical Examiner, conducted an autopsy in the presence of an assistant and four Park Police officers.

The FBI assisted the Park Police in certain aspects of the ensuing death investigation, as did other federal and Virginia agencies. Moreover, the FBI, at the direction of the Department of Justice, opened a separate investigation of possible obstruction of justice after a note was reportedly found on Monday, July 26, 1993, in Mr. Foster's briefcase at the White House.

On August 10, 1993, the Department of Justice, FBI, and Park Police jointly announced the results of the death and note investigations. The Park Police concluded that Mr. Foster committed suicide by gunshot in Fort Marcy Park. Robert Langston, Chief of the Park Police, explained:

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[4] *See* 16 U.S.C. § 1a-6(b). The FBI has mandatory jurisdiction to investigate possible murders of certain high-ranking individuals employed in the White House—those appointed under Section 105(a)(2)(A) of title 3 employed in the Executive Office of the President. *See* 18 U.S.C. § 1751(a) (defining persons covered by statute). Mr. Foster was appointed under Section 105(a)(2)(B) and thus was not an official covered by Section 1751. OIC Doc. No. DC-210-5151.

> The condition of the scene, the medical examiner's findings and the information gathered clearly indicate that Mr. Foster committed suicide. Without an eyewitness, the conclusion of suicide is deducted after a review of the injury, the presence of the weapon, the existence of some indicators of a reason, and the elimination of murder. Our investigation has found no evidence of foul play. The information gathered from associates, relatives and friends provide us with enough evidence to conclude that Mr. Foster's—that Mr. Foster was anxious about his work and he was distressed to the degree that he took his own life.[5]

Based on the evidence the FBI gathered in its investigation, the Department of Justice did not seek criminal charges for obstruction of justice relating to the handling of the note.[6]

B. 1994 Fiske Investigation

In 1992 and 1993, the Resolution Trust Corporation (RTC) examined the operations of Madison Guaranty Savings & Loan, a defunct savings and loan in Little Rock, Arkansas, that had been operated by James and Susan McDougal. The McDougals also had been partners with William Jefferson Clinton and Hillary Rodham Clinton in an Arkansas real estate venture known as the Whitewater Development Company. In October 1993, the RTC sent nine criminal referrals to

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[5] Federal News Service (August 10, 1993).

[6] *Id.*

the United States Attorney's Office in Little Rock concerning the activities of Madison Guaranty.[7]

Also in 1993, the FBI investigated the activities of Capital Management Services, Inc., a small business investment company in Little Rock that had been operated by David L. Hale. Mr. Hale was indicted by a federal grand jury in the Eastern District of Arkansas on September 23, 1993.

Both the Hale prosecution and the Madison investigation were transferred in November 1993 from the United States Attorney's Office in Little Rock to the Fraud Section of the Department of Justice in Washington. On December 20, 1993, the White House confirmed that Whitewater-related documents had been in Mr. Foster's White House office at the time of his death. On January 12, 1994, President Clinton asked Attorney General Reno to appoint an independent counsel, and on January 20, 1994, the Attorney General appointed Robert B. Fiske, Jr., to take over the investigation.

Mr. Fiske's jurisdictional mandate vested him with authority to investigate whether any individuals or entities committed federal crimes "relating in any way to President William Jefferson Clinton's or Mrs. Hillary Rodham Clinton's relationships with (1) Madison Guaranty Savings & Loan Association, (2) Whitewater Development Corporation, or (3) Capital Management Services." After his appointment, Mr. Fiske took over both the Hale prosecution and the continuing Madison investigation.

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[7] In September 1992, the RTC sent one criminal referral regarding Madison Guaranty to the United States Attorney's Office in Little Rock.

Mr. Fiske also opened a new investigation of Mr. Foster's death, utilizing FBI resources and a panel of distinguished and experienced pathologists. On June 30, 1994, Mr. Fiske issued a report concluding that "[t]he overwhelming weight of the evidence compels the conclusion . . . that Vincent Foster committed suicide in Fort Marcy Park on July 20, 1993."[8]

C. Congressional Inquiries

On February 24, 1994, Congressman William F. Clinger, Jr., then the Ranking Republican on the Committee on Government Operations of the United States House of Representatives, initiated a probe into the death of Mr. Foster. Mr. Clinger's staff interviewed emergency rescue personnel, law enforcement officials, and other persons involved in the Park Police investigation of Mr. Foster's death.[9] Mr. Clinger's staff obtained access to the Park Police reports and to photographs taken at the scene and at the autopsy.[10] Mr. Clinger issued a report on August 12, 1994, concluding that "all available facts lead to the undeniable conclusion that Vincent W. Foster, Jr. took his own life in Fort Marcy Park, Virginia on July 20, 1993."[11]

The United States Senate Committee on Banking, Housing, and Urban Affairs conducted an inquiry into the Park Police investigation of Mr. Foster's death.

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[8] Report of the Independent Counsel Robert B. Fiske, Jr., In Re Vincent W. Foster, Jr. at 58 (June 30, 1994) (Fiske Report).

[9] Summary Report by William F. Clinger, Jr., Ranking Republican, Committee on Government Operations, U.S. House of Representatives, on the Death of White House Deputy Counsel Vincent W. Foster, Jr., at 1 (Aug. 12, 1994).

[10] *Id.*

[11] *Id.* at 6.

The Committee concluded its inquiry with a report issued on January 3, 1995, stating that "[t]he evidence overwhelmingly supports the conclusion of the Park Police that on July 20, 1993, Mr. Foster died in Fort Marcy Park from a self- inflicted gun shot wound to the upper palate of his mouth."[12] The additional views of Senators D'Amato, Faircloth, Bond, Hatch, Shelby, Mack, and Domenici stated that "[w]e agree with the majority's conclusion that on July 20, 1993 Vincent Foster took his own life in Fort Marcy Park."[13]

D. Appointment of the Independent Counsel

On August 5, 1994, after enactment of the Independent Counsel Reauthorization Act of 1994, the Special Division of the United States Court of Appeals for the District of Columbia Circuit appointed Kenneth W. Starr as Independent Counsel In re: Madison Guaranty Savings & Loan Association. The OIC was given jurisdiction to investigate and prosecute matters "relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc."

Due to continuing questions about Mr. Foster's death, the relationship between Mr. Foster's death and the handling of documents (including Whitewater-related documents) from Mr. Foster's office after his death, and Mr. Foster's possible role or involvement in other events under investigation by the OIC, the OIC reviewed and analyzed the evidence gathered during

[12] S. Rep. No. 103-433, at 4 (Jan. 3, 1995).

[13] *Id.* at 51.

prior investigations of Mr. Foster's death and conducted further investigation.

III. OVERVIEW

A. Scrutiny

The gunshot death of a high-ranking White House lawyer who had been a law partner of the First Lady of the United States and friend to both the President and the First Lady was bound to be heavily scrutinized—and it has been. Many persons have publicly identified specific issues regarding Mr. Foster's death that, in their view, might raise broader questions about the ultimate conclusion that Mr. Foster committed suicide in Fort Marcy Park. Those questions have arisen and to some extent persisted for many of the same reasons that numerous suicides are questioned. In this case, as in many suicides, no identified eyewitness saw Mr. Foster commit suicide, and Mr. Foster apparently did not leave a suicide note (that is, a note that specifically refers to or contemplates suicide).[14]

The primary issues that have been raised regarding the cause and manner of Mr. Foster's death can be grouped into several broadly defined categories: (1) forensic issues; (2) apparent differences in statements of private witnesses, Park Police personnel, and Fairfax County Fire and Rescue Department (FCFRD) per-

[14] The great majority of individuals committing suicide do *not* leave a note. *See, e.g.*, Berman Report at 15; A. Leenaars, *Suicide Notes, Communication, and Ideation* in *Assessment and Prediction of Suicide* (R. Maris, A. Berman, J. Maltsberger & R. Yufit eds. 1992) (12-15% of suicide victims leave note); A. Berman, *Suicide Notes and Communications* in *Comprehensive Textbook of Suicidology and Suicide Prevention* (R. Maris, A. Berman & M. Silverman eds.) (forthcoming).

sonnel regarding their activities and observations at Fort Marcy Park on July 20; (3) physical evidence (such as the fatal bullet) that could not be recovered; and (4) the conduct of the Park Police investigation and the autopsy.[15]

B. OIC Personnel

To ensure that these issues were fully considered, carefully examined, and properly assessed in analyzing the cause and manner of Mr. Foster's death, the OIC retained a number of experienced experts and criminal investigators. The experts included Dr. Brian D. Blackbourne, Dr. Henry C. Lee, and Dr. Alan L. Berman.

Dr. Blackbourne has been County Medical Examiner for San Diego County, California, since 1990. He was Chief Medical Examiner for the Commonwealth of Massachusetts from 1983 to 1990; Deputy Chief Medical Examiner in Washington, D.C., from 1972 to 1982; and Assistant Medical Examiner in Metropolitan Dade County, Florida, from 1967 to 1972. He has taught and written widely, and has testified in court on numerous occasions. He has performed over 5,500 autopsies, over 700 of which have involved gunshot wounds. The autopsies have included over 800 homicides and over 700 suicides. He is a Fellow of the American Academy of Forensic Sciences and a member of the National Association of Medical Examiners.

Dr. Lee has served as Director of the Connecticut State Police Forensic Science Laboratory since 1980.

[15] Numerous individuals, including members of the news media, analyzed the information made public by the Senate after its inquiry and published or sent the OIC theories, articles, and reports. OIC investigators have reviewed that sizeable body of information and have taken it into account.

He has numerous professional affiliations and has served as a consultant to a variety of organizations. He has received over 400 awards and commendations, including a 1986 Distinguished Service Award and a 1994 Distinguished Fellow Award from the American Academy of Forensic Sciences. He has been qualified in many state and federal courts as an expert witness or an expert involved in forensic science, forensic serology, bloodspatter analysis, crime scene investigation, crime scene profiling, crime scene reconstruction, fingerprints, imprints, and general physical evidence. He has written or edited many books and articles, including *Physical Evidence* (1995), *Crime Scene Investigation* (1994), *Physical Evidence and Forensic Science* (1985), and *Physical Evidence and Crime Scene Investigation* (1983).

Since 1995, Dr. Berman has been Executive Director of the American Association of Suicidology. He was President of that Association in 1984-85. From 1991 to 1995, he was Director of the National Center for the Study and Prevention of Suicide. Since 1971, he has engaged in the private practice of psychotherapy and psychological consultation. In 1982, he received the Edwin S. Shneidman Award for outstanding contribution in research by the American Association of Suicidology. He has taught and written extensively on the subject of suicide, and has testified before committees of the United States House of Representatives and the United States Senate. He is a Distinguished Adjunct Professor of Psychology at the American University in Washington, D.C., and was a tenured professor in the Department of Psychology from 1979 to 1991. He was co-editor of *Assessment and Prediction of Suicide* (1992). He has been a Consulting Editor of

the journal *Suicide and Life-Threatening Behavior* since 1981.

OIC investigators who worked with these outside, independent experts included an FBI agent detailed from the FBI-MPD[16] Cold Case Homicide Squad in Washington, D.C. Agents with the Cold Case Squad work with MPD homicide detectives in reviewing and attempting to solve homicides that have remained unsolved for more than one year. Another OIC investigator has extensive homicide experience as a detective with the MPD in Washington, D.C., for over 20 years. Two other OIC investigators assigned to the Foster death matter have experience as FBI agents investigating homicides of federal officials and others.[17]

C. Methodology

The OIC devoted substantial effort to gathering, examining, and analyzing evidence to render as conclusive a determination as possible of the cause and manner of Mr. Foster's death. In this kind of investigation—a reconstruction based in part on evidence gathered and tested during prior investigations—the important information in assessing the cause and manner of death includes testimonial, documentary, and photographic evidence relating to the scene and the autopsy; physical and forensic evidence gathered at the scene and the autopsy; a variety of tests and analyses of the evidence; and testimonial and documentary evi-

[16] "MPD" refers to the Metropolitan Police Department of Washington, D.C.

[17] These investigators did not work on previous investigations of Mr. Foster's death.

dence revealing the decedent's activities and state of mind in the days and weeks before his death[18]

In particular, the OIC obtained information gathered during the prior investigations of Mr. Foster's death, including physical evidence; photographs taken at the scene and the autopsy; and incident reports, interview reports, and other documents produced or gathered by the Park Police, the FCFRD, the FBI, and Mr. Fiske's office. The OIC questioned the known and identified civilian witnesses who were in Fort Marcy Park in the late afternoon of July 20, the Park Police and FCFRD personnel who responded to Fort Marcy Park, and the medical personnel who were involved in the Foster matter. Many of these persons were questioned before the federal grand jury.[19]

As to forensic information, the OIC attempted to obtain certain physical and forensic evidence in addition to that which had been gathered in prior investigations. Experts retained by the OIC reviewed and examined the evidence. Dr. Lee reviewed and studied scene and autopsy photographs and documentation; studied, reexamined, and tested physical evidence; reviewed FBI Laboratory tests and the autopsy results; met with FBI Laboratory personnel and Dr. Beyer, the medical examiner who conducted the autopsy; and toured and examined the Fort Marcy Park scene. Dr. Lee submitted

[18] *See Crime Scene Investigation* (Lee ed. 1994); *see also Practical Homicide Investigation* (Geberth ed. 1996).

[19] The OIC also took appropriate steps to inquire into all allegations and information it received.

a report summarizing his work on the physical and forensic evidence and setting forth his analysis.[20]

Dr. Blackbourne reviewed the relevant reports and the scene and autopsy photographs; reviewed microscopic slides; examined the Fort Marcy Park area; and interviewed Dr. Beyer, Dr. Haut (the medical examiner who responded to the Fort Marcy scene on July 20), and FBI and Virginia laboratory personnel. Dr. Blackbourne prepared a report summarizing his work on the forensic issues and setting forth his analysis.

As to information regarding Mr. Foster's activities and state of mind before his death, the OIC both reinterviewed certain persons who had been interviewed during prior investigations and interviewed persons not previously interviewed. These individuals included a variety of family members, friends, and associates who could potentially shed light on Mr. Foster's activities and state of mind. The OIC reviewed documents gathered in prior investigations, and sought and reviewed new documents.

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[20] As Dr. Lee explained, a perfect reconstruction of the circumstances of Mr. Foster's death was not possible at the time of the OIC's investigation. The reasons include the lack of complete documentation of the original shooting scene; the lack of subsequent records and photographs of each item of physical evidence prior to examination; the lack of x-rays of Mr. Foster's body from the autopsy; the lack of documentation of the amount of blood, tissue, and bone fragments in the areas at the scene under and around Mr. Foster's head; the lack of close-up photographs of any definite patterns and quantity of the bloodstains found on Mr. Foster's clothing and body at the scene; and the unknown location of the fatal bullet, which makes complete reconstruction of the bullet trajectory difficult. Lee Report at 485.

The OIC provided Dr. Berman with relevant state-of-mind information (the bulk of which consisted of interview reports and transcripts), which he studied and analyzed. Dr. Berman submitted a report to the OIC summarizing his work and providing his analysis.

The OIC legal staff in Washington, D.C., and Little Rock, Arkansas, participated in assessing the evidence, considering the analyses and conclusions of the OIC experts and investigators, and preparing this report.

D. Report

This report will describe the factual background; the forensic evidence and analyses, including the autopsy findings; the analysis of Dr. Lee; and the analyses and reports prepared by Dr. Blackbourne and the pathologists retained by Mr. Fiske's office. Above all, the Foster death case is a forensic matter, and the forensic evidence and analyses provide the foundation for the ultimate conclusion. The report then will discuss investigative work conducted with respect to other, specific issues. Finally, the report will summarize Dr. Berman's conclusions regarding Mr. Foster's state of mind.[21]

The OIC has filed this summary report with the Special Division of the United States Court of Appeals. Because of the secrecy restrictions of Federal Rule of Criminal Procedure 6(e), the OIC has not submitted the

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[21] The OIC's summary report is based on, among other sources, Dr. Lee's analysis, Dr. Blackbourne's analysis, Dr. Berman's analysis, and a number of internal OIC memoranda prepared by OIC personnel. Those documents were based on and incorporate grand jury information. The documents represent the work product of the OIC and were part of the OIC's deliberative process used to reach a decision on the Foster death matter.

report to the Congress or released it directly to the public.[22] The Special Division retains discretion to authorize public release of this report, and the OIC has prepared the report with the assumption that the Special Division, consistent with past practice, would see fit to authorize public release. While some descriptions of forensic evidence are necessarily graphic, the OIC has sought to comply with the 1994 Independent Counsel Reauthorization Act regarding the contents of reports.[23]

Some of the best evidence of the condition of Mr. Foster's body at the time of his death is contained in photographs taken by Park Police officers at Fort Marcy Park and in photographs taken at the autopsy. However, based on traditional privacy considerations, this report does not include death scene or autopsy photographs. The potential for misuse and exploitation of such photographs is both substantial and obvious.[24]

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[22] Because considerable testimonial evidence was gathered before the grand jury, the OIC filed a Rule 6(e) disclosure application permitting the inclusion of grand jury information in this report to the Court. *See In re North*, 16 F.3d 1234, 1244 (D.C. Cir. 1994). The Court granted that motion.

[23] The Conference Report stated that an independent counsel must exercise "restraint" in a report and that "the conferees want to make it clear that the final report requirement is not intended in any way to authorize independent counsels to make public findings or conclusions that violate normal standards of due process, privacy or simple fairness." H.R. Conf. Rep. No. 103-511, at 19 (1994).

[24] *Cf., e.g., Navy Report Omits Suicide Notes*, N.Y. Times, Nov. 2, 1996, at 9 (regarding suicide of Admiral Boorda: "The Navy Department decided not to make the notes public. . . . Many other items in the report are blacked out, like the autopsy report and the identities of people interviewed by investigators."); *Katz v. National Archives and Records Administration*, 68 F.3d 1438, 1441 (D.C. Cir. 1995) ("Out of concern for the Kennedy family's privacy, . . . the x-rays and photographs did not become a part of the record of the Warren Commission.").

IV. FACTUAL SUMMARY

A. Mr. Foster's Background and Activities on July 20, 1993

Vincent W. Foster, Jr., was born on January 15, 1945, in Hope, Arkansas, to Alice Mae and Vincent W. Foster. He had two sisters, Sheila and Sharon. He was graduated from Hope High School in 1963 and from Davidson College in 1967. He married Elizabeth (Lisa) Braden in 1968, and they had three children, two boys and a girl. Mr. Foster was graduated first in his class from the University of Arkansas School of Law in 1971, where he was Managing Editor of the Law Review. He joined the Rose Law Firm in Little Rock in 1971 as an associate, and he became a Member of the Firm in 1974. Mr. Foster left the Rose Law Firm and moved to Washington in January 1993 to serve as Deputy White House Counsel.[25] He initially lived in Washington with his sister Sheila Anthony and her husband Beryl Anthony. Mrs. Lisa Foster moved to Washington in early June 1993, and the family lived in a house in the Georgetown section of Washington.

On the morning of Tuesday, July 20, 1993, six months into the Clinton Administration, Mr. Foster drove his gray Honda Accord to the White House from the house in Georgetown where he and his family were living. After dropping off his older son and his daughter on the way to work, Mr. Foster arrived at the suite on the

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[25] President and Mrs. Clinton had long-standing friendships with Mr. Foster. President Clinton and Mr. Foster first knew each other as children in Hope, Arkansas; Mrs. Clinton and Mr. Foster were long-time colleagues at the Rose Law Firm in Little Rock.

second floor of the White House's West Wing where White House Counsel Bernard Nussbaum and Mr. Foster had offices. Three assistants (Mr. Nussbaum's assistants Betsy Pond and Linda Tripp and Mr. Foster's assistant Deborah Gorham) and an intern (Thomas Castleton) had desks in the outer office of the suite.

According to the testimony of a number of witnesses, Mr. Foster attended the morning Rose Garden ceremony announcing the nomination of Louis J. Freeh to be Director of the FBI. According to Ms. Tripp and Ms. Pond, at about 12:00 or 12:30 p.m., Mr. Foster asked them for lunch from the White House mess.[26]

After eating lunch in his office, Mr. Foster left the Counsel's suite. He was seen leaving by Ms. Tripp, Ms. Pond, and Mr. Castleton.[27] The OIC, like the other investigative bodies before us, has not learned of or

[26] USPP Report, 7/22/93, at 1 (Pond interview); Tripp 302, 4/12/94, at 4.

As used in citations herein, the term "OIC" refers to a transcript of either an interview or a grand jury appearance by a witness. The term "302" is the traditional term used to refer to FBI interview reports and refers here to interview reports of investigators assigned to Mr. Fiske's Office or the OIC. For reports of interviews, the dates listed are those on which the interviews took place.

[27] When he left, Mr. Foster reportedly said something to the effect that there were M&M's in his office and "So long" or "I'll be back." *See* USPP Report, 7/22/93, at 1 (Castleton interview); Castleton 302, 5/3/94, at 2; USPP Report, 7/22/93, at 1 (Pond interview). As will be fully discussed below, Ms. Tripp and Ms. Pond said that Mr. Foster was not carrying a briefcase when he left the suite. Mr. Castleton stated that Mr. Foster was carrying a briefcase when he left.

located anyone who definitively[28] saw Mr. Foster from the time he left the White House until near 6:00 p.m., at which time a private citizen found Mr. Foster dead in Fort Marcy Park.

B. Fort Marcy

Fort Marcy was constructed as a Civil War earthwork fortification. It is located between the George Washington Memorial Parkway (GW Parkway) and Chain Bridge Road in the Virginia suburbs of Washington, D.C., approximately 6.5 miles by car from downtown Washington. The GW Parkway, on which there is virtually constant automobile traffic, runs along the Virginia side of the Potomac River from Mount Vernon to the Capital Beltway. Several bridges connect the Parkway (or roads leading to the Parkway) to Washington. A parking lot for the park is adjacent to the outbound side of the GW Parkway.[29] Inside the park, as of July 1993, were two cannons—one closer to the GW Parkway and a second (the one near which Mr. Foster was found) closer to Chain Bridge Road. That

[28] The one possible exception is a citizen who observed a car entering Fort Marcy in the mid-afternoon. His statements are described below.

[29] A pedestrian can enter Fort Marcy Park from Chain Bridge Road, but a chain-link fence prevents vehicle entry and did so in July 1993, according to information provided by the Park Service. OIC Doc. No. DC-229-1. Moreover, trees and thick vines are growing through the fence in a manner that reveals that the fence has been there for some years. OIC Investigators' Memorandum, 3/1/96, at 72.

second cannon is approximately 200 yards from the parking area.[30]

Thirty-one witnesses, 19 of whom observed Mr. Foster's body, have provided relevant testimony about their activities and observations in and around the Fort Marcy Park area on July 20, 1993. They include:

> 6 private citizens (one of whom discovered and observed Mr. Foster's body);[31]
>
> 13 Park Police personnel (9 of whom observed Mr. Foster's body);
>
> 11 Fairfax County Fire and Rescue Department (FCFRD) personnel (8 of whom observed the body); and
>
> Dr. Haut, the doctor representing the Medical Examiner's Office who responded to the scene and examined the body.

Between about 2:45 and 3:05 p.m., a citizen (C1) driving outbound on GW Parkway saw "a dark metallic grey, Japanese sedan" occupied by a single, white male abruptly enter Fort Marcy Park.[32] C1 said in his initial 1993 statement to the Park Police that the license plate was from Ohio or Arkansas.[33] Months later, on April 18, 1994, during Mr. Fiske's investigation, C1 was shown

[30] The trees, brush, and hills within the park were such that one would not walk in an absolutely straight line from the parking lot to the second cannon.

[31] For privacy reasons, the names of the private citizens will not be included in this report.

[32] USPP Report, 7/26/93 and 8/2/93, at 1 (C1 interviews). Mr. Foster's car was a gray Honda Accord, 4-door, with Arkansas license plates.

[33] *Id.*

photographs of Mr. Foster's car. C1 stated that the car in the photographs looked "similar" to the car he recalled, but that the license plate on it differed from that which he recalled.[34]

Another citizen (C2) drove his rental car into the Fort Marcy parking lot at approximately 4:30 p.m. While there, C2 saw one unoccupied car, which he described as a "rust brown colored car with Arkansas license plates."[35] C2 also saw another nearby car; that car was occupied by a man who exited his car as C2 exited his own car.[36] C2 described this man as having "a look like he had a—an agenda," although "everything I based my observation of this guy, was from my gut, more than anything else."[37] C2 and the man did not speak to one another.[38] C2 went into the park to urinate, and the other man had reentered his car by the time C2 returned to the parking lot.[39] C2 then left the park in his car.[40]

A man (C3) and woman (C4) pulled into the Fort Marcy parking area in C4's white Nissan at about 5:00 p.m. and were still at Fort Marcy when police and rescue personnel arrived shortly after 6:00 p.m.[41] While C3 and C4 were at Fort Marcy, another citizen (C5) drove his white van into the parking lot to urinate. C5 said that he exited his van, and while walking through

[34] 302, 4/18/94, at 2.

[35] OIC, 11/1/95, at 22, 28.

[36] *Id.* at 25.

[37] *Id.* at 27, 62.

[38] *Id.* at 61-62.

[39] *Id.* at 38.

[40] *Id.* at 61-62.

[41] USPP Report, 7/20/93, at 1 (C3 and C4 interviews).

the park, found Mr. Foster's body near the second cannon, the cannon closer to Chain Bridge Road.[42] C5 then left Fort Marcy and drove approximately 2.75 miles further outbound on the GW Parkway to a parking area near GW Parkway Headquarters; there, C5 reported the dead body to two off-duty Park Service employees who called 911.[43] Numerous Park Police and FCFRD personnel then responded to Fort Marcy Park.[44]

In the initial response, two groups of FCFRD personnel, as well as Park Police Officer Kevin Fornshill, arrived at Fort Marcy Park at approximately the same time—about 6:10 p.m.[45] They then split into teams to

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[42] OIC, 2/23/95, at 11, 22-33. The Fiske Report referred to this man as CW.

C5, among other observations, said that certain vegetation in the area appeared trampled, *id.* at 28-29, although no one else reported such an observation, *see, e.g.*, Fornshill 302, 4/29/94, at 4.

[43] C5 OIC, 2/23/95, at 39, 41-43. Records show that the 911 call was placed from a phone at that parking area. Investigators' 302, 4/29/94, at 1.

[44] In the meantime, a woman (C6) had left her broken-down blue Mercedes, with hazard lights flashing, on the entrance road leading to the Fort Marcy parking area. She walked along GW Parkway to a nearby exit to obtain assistance (as there was no phone at Fort Marcy Park). C6 302, 4/11/94, at 1-2.

[45] Fairfax County records reflect that 911 was first called at 5:59:59 p.m. The Park Police dispatcher was notified at 6:02:35 p.m. The first FCFRD personnel (Pisani, Iacone, and Wacha in Engine 1) arrived at Fort Marcy Park at 6:09:58 p.m. and the second group (Gonzalez, Hall, and Arthur in Medic 1) arrived at 6:10:16 p.m. Officer Fornshill of the Park Police arrived at 6:11:50 p.m., according to Park Police records. Fairfax County records show that the FCFRD personnel indicated at 6:37 p.m. that they were available on radio, which means that they had completed their duties,

search the park. Officer Fornshill and FCFRD personnel George Gonzalez and Todd Hall composed one group; FCFRD personnel Richard Arthur, James Iacone, Jennifer Wacha, and Ralph Pisani formed the other. The Fornshill-Hall-Gonzalez group first reached the body of Mr. Foster, and the other group joined them soon thereafter.

Twelve additional Park Police personnel subsequently arrived at Fort Marcy Park. Officer Franz Ferstl was the responding beat officer and, as such, was responsible for preparing the incident report. He responded to the scene at the same time as Officer Julie Spetz. Sergeant Robert Edwards, the District supervisor, also arrived on the scene. Ferstl, Spetz, and Edwards arrived before approximately 6:15 p.m., according to the report of Officer Christine Hodakievic, who arrived at approximately 6:15 p.m. and recorded the names of those officers already on the scene (Fornshill, Ferstl, Spetz, and Edwards). Lieutenant Patrick Gavin arrived in a supervisory role at roughly 6:30 p.m., according to his recollection.

According to their reports, Investigators Cheryl Braun and John Rolla, the lead Park Police investigators, arrived along with Investigator Renee Abt at about 6:35 p.m. They received investigative assistance from Officer Hodakievic, who was an investigator in training at that time. Peter Simonello, the Park Police identification technician responsible for gathering physical evidence, arrived shortly thereafter.[46]

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although it does not mean they necessarily had departed Fort Marcy Park at that time. Arthur OIC, 1/5/95, at 72-76.

[46] Officer William Watson and an intern later came to provide any needed assistance, as did Lieutenant Ronald Schmidt.

At the scene, Park Police investigators and the Park Police identification technician conducted interviews, examined the body and Mr. Foster's car, made notes, took photographs, and collected evidence. Later, five of the Park Police personnel prepared typed reports: the responding beat officer (Ferstl), the two lead investigators (Rolla and Braun), Officer Hodakievic, and the identification technician (Simonello). Several evidence receipts were prepared to record physical evidence obtained at the scene.

When the Park Police and rescue personnel found Mr. Foster's body, he was lying on his back on a berm in front of the second cannon, the cannon nearer Chain Bridge Road.[47] He was dead and had a gun in his right

[47] *See* FCFRD Report (Gonzalez) at 1-2 ("We came across the first cannon. I searched around this area and found nothing. We searched further to the next cannon and found a dead male [with] suit pants and dress shirt."); USPP Report (Ferstl) at 1 ("Ofc. Fornshill advised that he located the body just north of the second cannon"); USPP Report (Rolla) at 1 ("decedent was located . . . at the second cannon"); *see also* C5 302, 4/14/94, at 3 (referring to body's location at second cannon); Arthur OIC, 1/5/95, at 40 (same); Braun 302, 4/28/94, at 2 (same); Fornshill Senate Deposition, 7/12/94, at 15-16 (same); Gavin OIC, 2/23/95, at 12 (same; "last cannon"); Hall OIC, 1/5/95, at 18-19 (same); Hodakievic 302, 5/2/94, at 1 (same); Simonello 302, 4/28/94, at 1 (same); Wacha OIC, 1/10/95, at 32 (same). Walk-throughs conducted at the scene by investigative personnel with the witnesses confirmed this location within the park. In addition, two reporters and Park Police officers separately visited the scene on July 21 and 22, 1993, and identified the spot where the body had been located by the blood in the ground near the second cannon. Reporter 302, 4/18/96, at 1; Hill 302, 3/1/95, at 3.

Two botanists from the Department of Agriculture examined both the scene and the photographs that had been taken at the scene on July 20. They said that the plants depicted in the photographs were consistent with those observed during their examination of the second cannon area. 302, 6/2/95, at 1.

hand[48] (with his thumb trapped in the trigger guard). Gunshot residue-like material was observed on his right hand.[49] When the Park Police lifted and turned over the body later that evening, they noted a wound out the back of his head,[50] and blood on the ground underneath

[48] Both Hall and Gonzalez observed the gun in the right hand. *See* Hall OIC, 1/5/95, at 30-31; Hall Senate Deposition, 7/20/94, at 10; Gonzalez 302, 4/27/94, at 3; Gonzalez 302, 5/15/96, at 2. According to Officer Fornshill, as Hall was examining the body, Hall said words to the effect that "we've got a gun here" and pointed in the general direction of the decedent's right hand. Fornshill 302, 4/29/94, at 3; Senate Deposition, 7/12/94, at 21; OIC, 1/11/95, at 93, 114. Fornshill did not see the gun, however. 302, 4/29/94, at 3; OIC, 1/11/95, at 114. He said that he could not see the gun either because of his position or the vegetation around the hand. 302, 4/29/94, at 3; Senate Deposition, 7/12/94, at 21; OIC, 1/11/95, at 79. As to why he did not move into a position to confirm the existence of the gun, Fornshill said, "I'm not the investigator. I let the investigator do that. I'm maintaining the scene. If there's a gun at the scene, I'm making sure nobody touches the gun, I'm making sure nobody disturbs the gun. . . . If the EMT [emergency medical technician] tells me there's a gun there then I'll go with that." OIC, 1/11/95, at 115.

C5, when he earlier observed the body, did not see a gun in Mr. Foster's hand. 302, 4/14/94, at 4. The issue raised by C5's statement is discussed further below.

Mr. Foster was right-handed. *See, e.g.*, Beryl Anthony 302, 4/11/95, at 1; Sheila Anthony 302, 4/11/95, at 1; Lisa Foster 302, 4/7/95, at 1; Foster Younger Son 302, 4/7/95, at 3; Foster Older Son 302, 4/7/95, at 5; Foster Daughter 302, 4/7/95, at 4.

[49] *See* Rolla 302, 2/7/95, at 3; USPP Report (Simonello) at 1. The residue is apparent in Polaroid photographs taken at the scene.

[50] Rolla OIC, 2/9/95, at 28-29; Hodakievic OIC, 2/14/95, at 15.

his head and back.[51] They observed no signs of a struggle.[52]

Park Police also found a gray, 4-door Honda Accord with Arkansas plates in the parking lot; that car, the police discovered later that evening, was registered to Mr. Foster.[53] The two lead Park Police investigators (Braun and Rolla) photographed and examined the car and, during that examination, found Mr. Foster's White House identification.[54] The car was towed to a Park Police impoundment lot that night.[55] The next day, the car was further photographed and examined at the impoundment lot.[56]

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[51] This issue will be discussed further below.

[52] Fornshill 302, 4/29/94, at 4; Ferstl 302, 5/2/94, at 2; Rolla Senate Deposition, 7/21/94, at 99; Simonello 302, 2/7/95, at 3.

[53] USPP Report (Rolla) at 1.

[54] *See* USPP Report (Braun) at 2; Braun 302, 4/28/94, at 3; USPP Report (Rolla) at 2. Lieutenant Gavin said he was notified by the investigators at about 8:00 p.m. that the decedent was a White House employee. Gavin OIC, 2/23/95, at 24. Gavin subsequently notified an officer of the Uniformed Division of the Secret Service, Lieutenant Woltz. *Id.* at 25. To Lieutenant Gavin's knowledge, he was the first person to notify anyone at the White House or the Secret Service about Mr. Foster's death. *Id.* at 26-27. According to a Secret Service memorandum prepared at 10:01 p.m. on July 20, the Secret Service was notified of Mr. Foster's death at 8:30 p.m. when Lieutenant Woltz was contacted by Lieutenant Gavin. OIC Doc. No. DC- 211-147.

[55] Raley's Towing Receipt, Case No. 30502; USPP Impounded Car Record, Case No. 30502.

[56] USPP Report (Smith) at 1. Photographs were taken at the impound lot of the interior of the trunk of the car. Those photographs show stray papers, moccasin-type shoes, a book, cassette tapes, and the like (no evidence that a body had been in the trunk).

Dr. Haut, the medical examiner's representative, arrived at Fort Marcy Park at approximately 7:40 p.m. on July 20 and confirmed the death.[57] The body was then transported by FCFRD ambulance personnel to a morgue at Fairfax Hospital in Fairfax, Virginia.[58]

The witnesses' recollections of precise details at Fort Marcy Park vary in some respects (the differences will be explored below). Nonetheless, the evidence from the scene—including the gun, the apparent residue, the nature of the wound, the blood, the lack of any signs of a struggle—points to the conclusion that death resulted from suicide by gunshot. A final determination of the

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[57] Officer Hodakievic's report and Technician Simonello's report indicate that Dr. Haut arrived at 7:40 p.m. USPP Report (Hodakievic) at 1; USPP Report (Simonello) at 1. Investigator Abt's contemporaneous notes place Dr. Haut's arrival at 7:43 p.m. Although Dr. Haut subsequently recalled arriving at an earlier time, *see* 302, 4/14/94, at 1 (6:45 p.m.); OIC, 2/16/95, at 8 (7:15 p.m.), Dr. Haut did not contemporaneously record the time of his arrival. The several contemporaneously prepared notes and reports of the Park Police officers therefore are likely more accurate.

Dr. Haut completed a "Report of Investigation by Medical Examiner" after the incident; the report is stamped with the date July 30, 1993. OIC Doc. No. DC-106A-1 to DC-106A-2. The report states that the cause of death was "perforating gunshot wound mouth-head" and the means of death was "38 caliber handgun." *Id.* It states that the manner of death was "suicide." *Id.* Dr. Haut signed the death certificate. It states that the cause of death was "perforating gunshot wound mouth-head" and that the manner of death was "suicide" by "self-inflicted gunshot wound mouth to head."

[58] The body arrived at the hospital at approximately 8:30 p.m., according to logs of the FCFRD. Hospital and morgue logs show that Dr. Julian Orenstein viewed the body at the hospital in the ambulance at 8:49 p.m., and that the body was received at the morgue at 9:00 p.m., OIC Doc. Nos. DC-108-12 to DC-108-16.

manner of death depends on a variety of further investigative steps—most importantly, those associated with forensic science.

V. FORENSIC ANALYSES

The forensic analyses, in conjunction with the evidence from the scene, confirm that Mr. Foster committed suicide in Fort Marcy Park.

A. Autopsy

The autopsy occurred on July 21, 1993, in the presence of six persons. Dr. James Beyer, Deputy Chief Medical Examiner of the Virginia Office of the Chief Medical Examiner, conducted the autopsy, aided by an assistant. Park Police Sergeant Robert Rule and Officer James Morrissette observed the autopsy.[59] Park Police Identification Technicians Hill and Johnson took photographs at the autopsy and collected evidence such as clothing, blood samples, and hair samples. Dr. Beyer prepared an autopsy report. He has supplemented the report with testimony on several occasions.

Dr. Beyer has performed over 20,000 autopsies.[60] His responsibility is to determine cause of death and, in the case of a gunshot wound, to determine with the police the manner of death—suicide, homicide, accident, or undetermined.[61]

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[59] Officer Morrissette's report on the autopsy states: "After briefing him with the available information surrounding the crime scene and the victim he started the autopsy on the victim." USPP Report (Morrissette) at 1.

[60] Beyer OIC, 2/16/95, at 4.

[61] *Id.* at 5.

Dr. Beyer said Dr. Haut contacted him early on July 21, 1993, to advise him of Mr. Foster's death.[62] Dr. Beyer recalled that Dr. Haut indicated that there was a perforating gunshot wound (that is, a gunshot wound with an entrance and exit) and that the Park Police was the investigating agency.[63]

Dr. Beyer recalled that when he opened the body bag, there was blood on the right side of the face and on the right shoulder area of the shirt.[64] Dr. Beyer found a large amount of blood in the body bag.[65]

The autopsy report states that Mr. Foster's height was 6 feet and 4 1/2 inches and his weight was 197 pounds. The report indicates no problems or abnormalities with the cardiovascular system, respiratory system, liver, gall bladder, spleen, pancreas, adrenal and thyroid glands, gastrointestinal tract, genitourinary tract, kidneys, urinary bladder, or genitalia. The report states that the "[s]tomach contains a considerable amount of digested food material whose components cannot be identified."[66]

As to the head, the report indicates:

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[62] *Id.* at 8.

[63] *Id.* at 9. Dr. Beyer had no conversations with members of the White House, the Foster family, or Foster family attorneys in connection with the autopsy. *Id.* at 6.

[64] *Id.* at 10-11.

[65] Lee Report at 495.

[66] Officer Morrissette's report also indicates that Dr. Beyer stated at the autopsy "that it appeared that the victim had eaten a 'large' meal which he [Dr. Beyer] believed to have occurred within 2-3 hours prior to death." USPP Report (Morrissette) at 1. An exact time of death has not been established.

> Perforating gunshot wound mouth-head; entrance wound is in the posterior oropharynx at a point approximately 7 1/2" from the top of the head; there is also a defect in the tissues of the soft palate and some of these fragments contain probable powder debris. The wound track in the head continues backward and upward with an entrance wound just left of the foramen magnum with tissue damage to the brain stem and left cerebral hemisphere with an irregular exit scalp and skull defect near the midline in the occipital region. No metallic fragments recovered.

The report contains a diagram of the head and brain area that depicts the entrance wound and the fracture line. A separate diagram depicts the fracture lines, exit, and skull damage. A third page of diagrams of the head area states "perforating gunshot wound" and describes the entrance wound as follows: "Entrance—mouth—posterior oropharynx—large defect—soft palate defect / powder debris identified." It describes the exit wound as a wound of 1 1/4" x 1". The report indicates "backward" and "upward" as the direction of the bullet through the head.[67]

With respect to the wound, Dr. Beyer stated: "The entrance wound was in the back of the mouth, what we call the posterior oropharynx, where a large defect was present. There was also a soft palate tissue defect, and powder debris could be identified in the area of the soft palate and the back of the mouth. The exit wound is depicted [in the autopsy report] as being present three

[67] Officer Morrissette's report similarly indicates that "[t]he cause of death was determined to be 'perforated gunshot wound in and out.' The point of entry was in the back of the mouth with the exit in the back of the head." *Id.*

inches from the top of the head, approximately in the midline, and there is an irregular wound measuring one and one-quarter inch by one inch."[68] There was "good alignment" between the entrance and exit wounds, and there was "no reason to think that this was not an entrance and exit defect configuration."[69] As the report indicates, Dr. Beyer did not recover any bullets or bullet fragments from the body.[70]

The report states that "[s]ections of soft palate" were "positive for powder debris," and Dr. Beyer said that the gunpowder debris in the mouth was "grossly present," meaning that it could be seen with the naked

[68] OIC, 2/16/95, at 19.

[69] *Id.* at 20.

[70] *Id.* at 16. The lack of a bullet or bullet fragments was confirmed by others who attended the autopsy. Dr. Beyer's assistant recalled that Dr. Beyer inserted a probe through the path of the bullet before the skull was opened and commented that the path was clear. (Autopsy photographs clearly depict the wound and the probe through the wound path.) The assistant recalled that after the brain was removed and visually inspected, Dr. Beyer dissected it with cuts of approximately one-eighth inch thickness, and that no bullet fragments were located in the brain. 302, 9/11/95, at 2-3. According to Officer Morrissette's report, Dr. Beyer stated "that the bullet trajectory was 'upward and backward' exiting in the center line of the back of the head" and that "there was no evidence of bullet fragments in the head." USPP Report (Morrissette) at 1. Officer Johnson recalled the examination of the wound path and said that no projectile or bullet fragment was recovered. Johnson recalled that Dr. Beyer may have mentioned that it was a clean wound, meaning that it was a through-and-through shot. 302, 2/2/95, at 2. Sergeant Rule similarly recalled being present when the skull was opened and the wound track examined; no projectile or fragments were recovered. 302, 2/3/95, at 2. Technician Hill recalled that a trajectory rod was inserted in the wound track and that no bullet or bullet fragment was recovered. 302, 3/1/95, at 1-2.

eye, and was present in a "large amount."[71] Thus, Dr. Beyer stated that "the obvious finding was that the muzzle of the weapon had to be in his mouth, close to the back of his throat, back of his mouth."[72]

Dr. Beyer said that he performed "an external examination of the body, with photography of the body. We then examine the body for any identifying marks, such as scars, tatoos or wounds."[73] Dr. Beyer stated that he recalls observing powder debris on the right hand.[74] He recalled gunpowder debris on the left hand to a much lesser degree.[75] (The diagrams in the autopsy report indicate "black material" on both the right hand and the left hand.) Dr. Beyer also recalled a "tanish brownish indentation" across the back of the right thumb (the thumb which had been in the trigger guard).[76]

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[71] OIC, 2/16/95, at 20, 22.

[72] *Id.* at 22.

[73] *Id.* at 12.

[74] *Id.* at 16. Officer Morrissette's report states that Dr. Beyer "pointed out what he thought to be gunpowder residue on the right hand forefinger of the victim. I supplied him with a picture of the crime scene in which the suspected residue was evident." USPP Report (Morrissette) at 1. Officer Johnson also recalled black marks on the right hand. 302, 2/2/95, at 2. Technician Hill recalled apparent gunshot residue on Mr. Foster's hand. 302, 3/1/95, at 2. Sergeant Rule recalled apparent gunshot residue on Mr. Foster's right hand. 302, 2/3/95, at 2.

[75] OIC, 2/16/95, at 16.

[76] *Id.* Semen was found on Mr. Foster's shorts by the FBI Laboratory. FBI Lab Report, 5/9/94, at 10. Involuntary urination and secretion of seminal fluid often occur upon death. Berman Report at 15; Hirsch OIC, 2/16/95, at 46; Beyer OIC, 2/16/95, at 15; OIC Memorandum (Blackbourne).

Dr. Beyer said that observation of Mr. Foster's body revealed no wounds on the neck, hands, buttocks, shoulder, back, or any portion of the body other than the head; he said, moreover, that any such wounds would have been registered on the anatomic diagram.[77]

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[77] OIC, 2/16/95, at 12-13. The lack of other wounds was confirmed by others at the autopsy. Dr. Beyer's assistant, for example, said he did not see any other wounds on Mr. Foster's body. 302, 9/11/95, at 3. Officer Johnson stated that he did not observe any trauma or other marks on the body other than the gunshot wound to the mouth and skull. 302, 2/2/95, at 2. Sergeant Rule stated that he did not observe or hear mention of any trauma to Mr. Foster other than the bullet wound to the mouth and skull. 302, 2/3/95, at 2. Technician Hill recalled the damage to the rear of the skull as the only trauma she observed. 302, 3/1/95, at 2. Officer Morrissette stated that he relied on Dr. Beyer's observations and descriptions at the autopsy and that he recalled neither Dr. Beyer nor anyone else making any mention of other wounds or trauma. 302, 2/10/95, at 3. An interview report of George Gonzalez, one of the FCFRD personnel on the scene at Fort Marcy Park, stated that Gonzalez believed he had seen a wound in the upper-right-front portion of the skull. 302, 2/23/94, at 2. In another interview, Gonzalez stated that that report does not reflect "what [he] recalls or what he intended to report." 302, 5/15/96, at 3. Another of the FCFRD personnel, Richard Arthur, initially said he saw what "appeared to be a bullet wound, an entrance wound" on the neck. OIC, 1/5/95, at 63. After examining autopsy photos, which he said were taken from a better angle and a better view, he said he may have been mistaken about such a wound. 302, 4/24/96, at 1.

The initial statements of Gonzalez and Arthur were explored during the Senate's inquiry into Mr. Foster's death, the probe by Mr. Clinger, and the Fiske investigation. Those investigations included examination of the scene and autopsy photographs and found that the only wound to Mr. Foster was the gunshot wound through the back of his mouth and out the back of his head. *See, e.g.*, Fiske Report at 33 n.* ("The autopsy results, the photographs taken at the scene, and the observations made by Park Police investigators conclusively show that there were no such wounds"

Dr. Beyer stated that "[t]here was no evidence of any trauma to the individual other than the gunshot wound."[78]

Dr. Beyer concluded that this was a self-inflicted wound[79] based upon the fact that there was no evidence of any trauma other than the gunshot wound, and "no evidence of any central nervous system depression or diseased state that would have permitted, in my estimation, somebody to walk up and put a gun in his mouth and pull the trigger."[80]

Dr. Beyer's conclusions were reviewed by two sets of experts, one set retained by the OIC and the other by Mr. Fiske's office. Their analyses of Dr. Beyer's findings and of the relevant laboratory analyses are outlined below. They confirm the conclusions reached at the autopsy.

B. <u>Laboratory Analyses</u>

A number of photographs were taken at Fort Marcy Park and at the autopsy.[81] In addition, at both the scene and the autopsy, the Park Police obtained physical evidence. Evidence receipts show that, at the Fort Marcy scene, the Park Police obtained physical evidence and clothing, including the following:

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as those recalled by Gonzalez and Arthur.). OIC experts and investigators carefully reviewed the evidence and reached that same conclusion, as will be discussed further below.

[78] OIC, 2/16/95, at 26.

[79] *Id.* at 23.

[80] *Id.* at 26.

[81] The issue of photographs taken at Fort Marcy is discussed further below.

* Colt Army Special .38 caliber revolver, 4", 6-shot (obtained from "right hand victim")
* round .38 caliber RP 38 SPL HV
  (from "revolver")
* casing .38 caliber RP 38 SPL HV
  (from "revolver")
* eyeglasses
  (from "bottom of berm")
* Seiko quartz wrist watch
  (from "Deceased left wrist")
* pager
  (from "Deceased right side waist area")
* silver colored ring
  (from "Deceased right ring finger")
* gold colored band type ring
  (from "Deceased left ring finger")
* black suit jacket
  (from "front passenger seat of gray Honda")
* blue silk tie with swans
  (on "top of coat on front passenger seat")
* White House Identification
  (from "under coat on front passenger seat")
* brown leather wallet
  (from "inside suit jacket pocket of suit jacket from front passenger seat")

At the autopsy, the Park Police obtained physical evidence and clothing, including the following:

* one vial of blood
* lock seal envelope containing pulled head hairs
* white colored long sleeve button down shirt with blood stain
* white colored short sleeve t-shirt with blood stain
* pair white colored boxer shorts
* pair blue gray colored pants with black colored belt
* pair black colored socks
* pair black colored dress shoes, size 11M

The Park Police and Medical Examiner's Office caused several laboratory tests of the evidence to be performed during the initial 1993 investigation. In addition, Mr. Fiske's office and the OIC submitted physical evidence collected during the investigation of Mr. Foster's death to the FBI Laboratory, which has produced reports analyzing physical evidence. The OIC also submitted physical evidence to Dr. Lee, and he, too, produced a report based on his laboratory analyses. The following summarizes the relevant laboratory analyses.

1. Gun

a. Operation

The .38 caliber revolver recovered from Mr. Foster's hand at Fort Marcy Park had a four-inch barrel and a capacity of six shots.[82] It had one live round and one

[82] USPP Evidence/Property Control Receipt (Simonello) at 1.

spent casing.[83] Had the trigger been pulled again, the next shot would have fired the remaining round.[84]

In August 1993, at the request of the Park Police, the Bureau of Alcohol, Tobacco and Firearms (ATF) Laboratory examined the revolver and found that it functioned. The ATF Laboratory determined that the cartridge case found in the cylinder under the hammer was fired in that gun.[85] The FBI Laboratory also test-fired the gun and determined that it "functioned normally" and that the trigger pulls were normal.[86] The .38 caliber cartridge case "was identified as having been fired in the . . . revolver."[87] Like the expended cartridge, the unexpended cartridge was .38 caliber manufactured by Remington. They bore similar headstamps.[88] Dr. Lee also test-fired the revolver and found that it was operable.[89]

b. Serial Numbers

An ATF report on the gun's two serial numbers revealed a purchase at the Seattle Hardware Company in Seattle, Washington, on September 14, 1913, and at the Gus Habich Company in Indianapolis, Indiana, on December 29, 1913.[90] The gun could not be further traced.[91] Laboratory examination of the gun

[83] *Id.*

[84] OIC Investigators' Memorandum, 6/22/95, at 2.

[85] ATF Lab Report, 8/17/93, at 1.

[86] FBI Lab Report, 5/9/94, at 6.

[87] *Id.*

[88] *Id.*

[89] Lee Report at 451-54.

[90] ATF Report of Firearms Tracing, National Tracing Center.

[91] *Id.*

found no indication of any alteration of the serial number of the weapon. . . . The additional serial number on the crane of the firearm most likely occurred at some time when the eighty year-old weapon was repaired. There is no realistic way to determine when such a repair occurred. The exchange of the two numbers between the frame and the crane is a condition noted on many similar firearms in the Laboratory's Reference Firearms Collection and is not considered significant.[92]

c. **Ammunition**

Dr. Lee noted that the ammunition found in this weapon was type "RP .38 SPL HV," manufactured by Remington Peters. Dr. Lee stated that information from the manufacturer indicated that this ammunition was discontinued in 1975, and that the cartridge therefore would have been manufactured prior to that time.[93]

d. **DNA**

DNA consistent with Mr. Foster's DNA was detected on the muzzle portion of the barrel of the revolver. In particular, DNA type DQ alpha 2, 4 was detected on the gun and in Mr. Foster's blood.[94]

e. **Blood**

The gun was recovered at the scene by Park Police Technician Simonello and subsequently packaged in

[92] FBI Lab Report, 6/21/94, at 1.

[93] Lee Report at 488-89. That finding is consistent with the fact that, as is explained below, the gun at one time likely was located in the home of Mr. Foster's parents in Hope, Arkansas.

[94] FBI Lab Report, 5/9/94, at 10.

brown paper for storage in an evidence locker.[95] While the Park Police's subsequent examinations for fingerprints and other evidence could have removed some trace evidence that might have existed on the gun, Dr. Lee examined the gun and reported that "[s]mall specks of brownish-colored deposits were noted."[96] Dr. Lee found that "[s]ome of these deposits gave positive results with a chemical test for blood" although the "quantity of sample present was insufficient for further analysis."[97]

Dr. Lee also reported that "[m]acroscopic and microscopic examination of [the] piece of paper" originally wrapped around the barrel of the revolver for evidence storage "revealed the presence of reddish-colored particles. These stains also gave positive results with a chemical test for blood."[98] Dr. Lee stated that "[t]his fact suggests that the barrel of the weapon was in contact or at close range to a source of liquid blood."[99] Dr. Lee further stated that "[b]lood spatters and tissue-like materials were noted on the fingerprint lift tape from the weapon."[100] He reported that "[c]hemical tests for blood were positive with some of these materials."[101] Dr. Lee concluded that "[t]he presence of blood and tissue-like materials on the lifts is another strong

[95] USPP Report (Simonello) at 1 ("I then wrapped the barrel in brown paper"); USPP Report (Smith) at 1.

[96] Lee Report at 286.

[97] *Id.*

[98] *Id.* at 488.

[99] *Id.*

[100] *Id.*

[101] *Id.*

indication that this weapon was fired while in contact with or close to a blood source."[102]

f. Fingerprints

Identification Technician E.J. Smith of the Park Police examined the gun for latent fingerprints[103] on July 23, 1993. The results were negative.[104] The FBI Laboratory later examined the gun and similarly detected no latent prints on the exterior surface of the weapon.[105]

In his report to the OIC, Dr. Lee explained that "[t]he handle grip area of [the .38 Colt revolver] is textured and is not typical of the type of surface which commonly results in the development of identifiable latent fingerprints."[106] He also noted that the fingerprint powder method was used when the Park Police initially tested the gun; "[a]lthough the fingerprint powder method is one of the most common techniques used in the latent print field, there are also newer technologies, such as cyanoacrylate fuming, laser, and forensic lighting techniques which could have been used in this case. It is unknown at this time whether these

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[102] *Id.*

[103] Fingerprint examiners can perform fingerprint identifications when they obtain a sufficient number of ridge details to allow an identification. *See generally Physical Evidence* at 171 (Lee ed.).

[104] USPP Report (Smith) at 1. Identification Technician Simonello noted in his report of July 29, 1993, that "[o]n Sunday July 25, 1993, I was advised by Tech. S. Hill that item #1 had been processed for latent prints by Tech. E.J. Smith and that the results were negative." USPP Report (Simonello) at 1.

[105] FBI Lab Report, 6/9/94, at 2.

[106] Lee Report at 487.

techniques would have provided additional information" had they initially been employed.[107]

The FBI Laboratory also noted that a lack of fingerprints is not extraordinary and that "[g]enerally, the determining factors in leaving latent prints are having a transferable substance, i.e., sweat, sebaceous oil or other substance on the fingers, and having a surface that is receptive to receiving the substance that forms the latent prints. A clean, smooth, flat surface is most receptive for transfer of any substance from the fingers,"[108] and the surface of the grip handle at issue here was textured, not smooth.

g. Marks on Body from Gunshot and Gun

(1) Gunshot Residue on Hands

The photographs of Mr. Foster's right hand taken at Fort Marcy Park and during the autopsy depict black gunshot residue-like material on the right forefinger and the area between the thumb and forefinger. The autopsy report also noted material on the forefinger area of the left hand.

During the Park Police investigation, the ATF Laboratory found that gunshot residue patterns reproduced

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[107] *Id.* at 487-88.

[108] FBI Lab Report, 6/9/94, at 2. The FBI Laboratory, during its examinations, found one latent fingerprint on the underside of the pistol grip (that is, not on an exterior surface of the gun). FBI Lab Report, 7/19/95, at 1. This print has been compared to prints of Mr. Foster and of evidence technicians who initially handled the gun, but no identifications were effected. FBI Lab Report, 12/13/95, at 1; FBI Lab Report, 8/14/95, at 1. This print would have been left by someone who assembled or disassembled the gun, for example, to repair it or to put on new grips or for some other reason.

in the laboratory were consistent with those seen in the photographs taken by the Park Police at the scene.[109] The FBI Laboratory similarly stated that gunshot residue on the right forefinger area of the right hand is "consistent with the disposition of smoke from muzzle blast or cylinder blast when the . . . revolver is fired using ammunition like that represented by" the cartridge and casing recovered from the gun "when this area of the right hand is positioned near the front of the cylinder or to the side of and near the muzzle."[110]

Dr. Lee conducted test firings using a laboratory standard weapon and the same kind of ammunition that was found in the revolver recovered from Mr. Foster's hand. With the standard weapon, little or no observable gunpowder particles were released from the cylinder area or onto the shooter's hand.[111] However, Dr. Lee reported that each test-fired shot of the revolver found in Mr. Foster's hand at Fort Marcy Park produced a significant amount of unburned and partially burned gunpowder.[112] Relatedly, Dr. Lee reported that the gun had an "extraordinary front cylinder gap"[113] (the space between the cylinder and the barrel) of .01 inch through which gunpowder residue is expelled when the gun is fired. Dr. Lee stated that the gap was one "possible cause[] of the deposit of a large amount of gunshot residue particles on Mr. Foster's body and clothing."[114]

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[109] ATF Lab Report, 8/17/93, at 1.

[110] FBI Lab Report, 5/9/94, at 7.

[111] Lee Report at 489.

[112] *Id.*

[113] *Id.* at 487.

[114] *Id.*

(2) Indentation on Thumb

The revolver was recovered from Mr. Foster's right hand at the scene at Fort Marcy Park by Park Police Technician Simonello. Technician Simonello reported that Mr. Foster's thumb was trapped in the trigger guard of the gun.[115] Consistent with Technician Simonello's observation, the autopsy photographs depict an indentation mark on the inside of the right thumb.

> The mark on the inside of the right thumb which is visible in the [autopsy] photograph is consistent with a mark produced by the trigger of the . . . revolver when this portion of the right thumb is wedged between the front of the trigger and the inside of the front of the trigger guard of the . . . revolver when the trigger rebounds (moves forward). The trigger of the . . . revolver automatically rebounds when released after firing (single or double action) or whenever the trigger is released after it is moved to the rear. This mark is consistent with the position of the right thumb of the victim in the trigger guard of the revolver in [three Polaroid] photographs.[116]

h. Summary: Gun

Dr. Lee concluded, "[b]ased on laboratory observations and the examination of the scene photographs," that "the revolver . . . is consistent with the weapon

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[115] USPP Report (Simonello) at 1 ("The right thumb was trapped between the trigger and inside front edge of the trigger guard."). Thus, Technician Simonello indicated that the revolver could not be easily removed. 302, 2/7/95, at 3.

[116] FBI Lab Report, 5/9/94, at 7.

which resulted in the death of Mr. Vincent Foster. The barrel of this weapon was likely in Mr. Foster's mouth at the time the weapon was discharged. Gunshot residue noted on Mr. Foster's right hand and the lesser amount of deposits on his left hand indicated that Mr. Foster held the weapon when it was fired."[117]

2. Clothing

At the autopsy, clothing was removed from Mr. Foster's body and placed on a table in the autopsy room.[118] Park Police Officer Johnson took this clothing and placed it in a single bag for return to the Park Police offices.[119] There, brown wrapping paper was laid on the floor of a photography room and the clothes placed on that paper.[120] The clothes were left to dry in the photography room until Monday, July 26, when Technician Simonello packaged the clothing and put it into an evidence locker.[121]

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[117] Lee Report at 488.

[118] Johnson 302, 2/2/95, at 2. As noted above, this clothing consisted of the shirt, t-shirt, pants, belt, boxer shorts, shoes, and socks.

[119] *Id.* Because the clothing was packaged together before trace evidence was collected, specific trace evidence (in particular, that which is more readily transferred) cannot be conclusively linked to particular items of clothing that Mr. Foster was wearing at the time of his death. To obtain precise trace evidence analyses, each item must be kept separate before trace evidence is collected. *See Crime Scene Investigation* at 89 (Lee ed. 1994) ("The collection and preservation of physical evidence is the most important building block available to the crime scene investigator. . . . Each type of physical evidence has unique properties and must be collected and preserved carefully to avoid contamination.").

[120] *Id.* at 2-3.

[121] USPP Report (Simonello) at 1.

The FBI Laboratory and Dr. Lee independently examined the clothing, examined debris collected from the clothing by the FBI Laboratory during the 1994 investigation conducted by Mr. Fiske's Office, studied photographs taken at the scene and autopsy, and reported a number of findings related to the clothing.

a. Gunshot Residue

Dr. Lee, in his examinations, reported "[s]mall deposits of gunpowder residue and partially burned gunpowder particles" on the shirt.[122] Earlier FBI Laboratory examination of the shirt resulted in a positive reaction for vaporized lead and very fine particulate lead on the front of the shirt. "This type of reaction is consistent with the type of reaction expected when a firearm is discharged in close proximity to this portion of the shirt. It is consistent with muzzle blast or cylinder blast from a revolver like the [submitted] revolver using ammunition like" the cartridge and cartridge case submitted with the gun.[123] The FBI Laboratory further stated that

> [s]ubsequent chemical processing of the . . . shirt in the Laboratory revealed lead residues in a small area near the sixth button from the collar on the front of the . . . shirt. This reaction could have been caused by contact with a source of lead residues. Lead residues were also detected on the underside of the edge of the collar on the left side of the . . . shirt. This small area of lead residues could have been caused by the discharge of a firearm consistent with the positive reaction noted

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[122] Lee Report at 490.

[123] FBI Lab Report, 5/9/94, at 6.

above when the [submitted] shirt was received in the Laboratory.[124]

The FBI Laboratory reported that these gunshot residues "are consistent with the cylinder blast or the muzzle blast" which would be produced if the revolver was fired "in close proximity to the front of th[is] shirt."[125]

Similarly, when the ATF Laboratory, at the request of the Park Police, tested Mr. Foster's shirt, it found "a positive reaction consistent with the discharge of a revolver in close proximity to the upper front of the shirt."[126]

b. Bloodstain Patterns as Depicted in Photographs from Scene

The FBI Laboratory examined the bloodstain patterns depicted in the Polaroids taken at the scene. The Laboratory Report stated:

> Photographs of the victim at the incident scene depict apparent blood stains on his face and the right shoulder of his dress shirt. The staining on the shirt covers the top of the shoulder from the

[124] *Id.*

[125] FBI Lab Report, 6/13/94, at 2. In debris collected from the clothing, the FBI Laboratory found approximately 20 gunpowder particles that were similar to the gunpowder in the fired cartridge case of the gun found in Mr. Foster's hand, and two that were not. The Laboratory stated that one of the two dissimilar particles was "not consistent with having originated from a fired cartridge" and the other one was found "on a piece of paper used to dry Foster's clothes." *Id.* at 3. From these facts, the Laboratory stated that these two particles are "not likely associated with this investigation." *Id.*

[126] ATF Lab Report, 8/17/93, at 2.

> neck to the top of the arm and consists of saturating stains typical of having been caused by a flow of blood onto or soaking into the fabric. The stains on his face take the form of two drain tracks and one larger contact stain. . . .
>
> The contact stain on the right cheek and jaw of the victim is typical of having been caused by a blotting action, such as would happen if a blood-soaked object was brought in contact with the side of his face and taken away, leaving the observed pattern behind. The closest blood-bearing object which could have caused this staining is the right shoulder of the victim's shirt. The quantity, configuration and distribution of the blood on the shirt and the right cheek and jaw of the victim are consistent with the jaw being in contact with the shoulder of the shirt at some time.[127]

Dr. Lee also examined the photographs taken at Fort Marcy Park. He noted that the photographs of the shirt show several areas of bloodstains, including "saturated-type bloodstains" on the "shoulder and collar region."[128]

On a separate bloodstain issue, Dr. Lee examined the photographs and reported that "[h]igh velocity impact type blood spatters were observed on Mr. Foster's face, hands, and shirt."[129] Dr. Lee stated that "[t]his type of blood spatter typically is produced at the time when a weapon is discharged and the spatters result from the

[127] FBI Lab Report, 5/9/94, at 9.

[128] Lee Report at 494. The FBI Laboratory determined that blood on the shirt and t-shirt were consistent with Mr. Foster's blood type. FBI Lab Report, 5/9/94, at 10.

[129] Lee Report at 495.

backspatter of the gunshot wound."[130] Dr. Lee reported that "[t]hese blood spatters are intact and no signs of alteration or smudging were observed."[131] This finding is in conflict with any theory that the fatal shot was fired elsewhere and the head wrapped during movement or cleaned upon arrival—because those actions likely would have altered, smudged, or eliminated the blood spatters, contrary to what Dr. Lee found.[132]

c. Blood Drainage After Movement from Fort Marcy Park and Bloodstains on Clothing at Autopsy

Dr. Lee noted that Dr. Beyer had "observed a large amount of liquid blood in the body bag and in Mr. Foster's body," which "further indicates that the location where the body was found is consistent with the primary scene [and that it] is, therefore, unlikely that Mr. Foster's body was moved to the Fort Marcy Park scene from another location."[133]

The shirt itself, which was removed at the autopsy after movement of the body to the morgue, contains bloodstains on areas where blood does not appear in the photographs of the body at the scene.[134] Dr. Lee stated that these stains on the shirt "most likely occurred

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[130] *Id.*

[131] *Id.*

[132] OIC Investigators' Memorandum (Lee). In addition, Dr. Lee examined the shoes and found "[n]o heavy bloodstains or dripping type bloodstain patterns," Lee Report at 492, contrary to what might have been found had the body somehow been moved in an upright position. OIC Investigators' Memorandum (Lee).

[133] Lee Report at 495.

[134] *Id.* at 490, 494.

when the body was placed into the body bag and moved from the scene and/or when in the body bag, prior to the collection of the decedent's clothing."[135] As noted below, the experts concluded that the shirt likely would have been more extensively stained when the body was found at the second cannon area at Fort Marcy Park had the body been moved from another location.

d. Mineral/Vegetative Material

Dr. Lee reported that examination of a photograph of Mr. Foster's shoes taken by the FBI Laboratory at the time of its initial examination revealed brownish smears on the left heel.[136] Dr. Lee further stated that his own macroscopic and microscopic examinations of the shoes revealed the presence of soil-like debris.[137] (The FBI Laboratory photo of the shoes, taken in 1994 at the time of the Laboratory's examination of the clothing, shows traces of soil visible to the naked eye.) Dr. Lee found that "[t]race materials were located embedded in the grooves of the sole patterns at the heel of [the left shoe]. A portion of this

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[135] *Id.* at 490. As to the pants, which also were removed after the body was moved in the body bag to the morgue, "[m]acroscopic and microscopic examination . . . revealed the presence of bloodstains. The majority of these bloodstains were consistent with contact transfer type bloodstain patterns." *Id.* at 492. Dr. Lee reported that no bloodstains or gunpowder particles were found on the jacket. That fact, Dr. Lee stated, "indicates that Mr. Foster was not wearing the jacket or the jacket was not in close proximity to the weapon at the time the weapon was discharged." *Id.* at 490. That finding comports with the evidence: Mr. Foster was not wearing a suit jacket when he was found; rather, his jacket was recovered from his car at Fort Marcy Park. *See supra* at 35.

[136] Lee Report at 491.

[137] *Id.*

material subsequently was removed. Microscopic and macroscopic examination showed this material to contain mineral particles, including mica, other soil materials, and vegetative matter."[138] Dr. Lee stated that this fact "indicates the sole of the shoe had direct contact with a soil surface containing these materials."[139]

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[138] *Id.* at 492.

[139] *Id.* It was not possible to associate definitively any of these mica or soil materials with Fort Marcy Park. As the FBI Laboratory explained, "[t]he trace amount of loose, unconsolidated soil" like that found on Mr. Foster's shoes and in the debris from the clothing "limits the meaningfulness regarding a comparison with other soils." Therefore, these materials "could have originated from the micaceous soil found at Fort Marcy, but the nature of this soil precludes an unambiguous association." FBI Lab Report, 7/9/96, at 1.

There has been misunderstanding of the statement in an earlier FBI Lab report that no "*coherent* soil" was found in the samples. FBI Lab Report, 5/9/94, at 12 (emphasis added). The FBI Lab Report's statement regarding a lack of coherent soil simply means, as explained in the preceding paragraph, that there was insufficient soil to effect a comparison with soil samples from Fort Marcy Park. But a lack of *coherent* soil is not the same as a lack of any trace of soil. And as Dr. Lee concluded, examination of Mr. Foster's shoes revealed particles of soil materials, indicating that the sole of the shoe did in fact have direct contact with a soil surface.

Regarding the lack of mud or "coherent" soil, the weather on July 20, 1993, and throughout the month of July was hot and dry in the area surrounding Fort Marcy Park. Weather information for National Airport, a few miles from Fort Marcy Park, from the National Oceanic and Atmospheric Administration indicates that on July 20, 1993, the temperature ranged from a low of 75 degrees to a high of 96 degrees. There was no recorded precipitation. For the month of July 1993, total precipitation was 1.36 inches, which is 2.44 inches below normal. The average temperature for the month

e. <u>Lack of Rips, Tears, or Scraping on Clothing</u>

Dr. Lee found a small amount of vegetative material on Mr. Foster's shirt that could have resulted from contact with the ground in the park.[140] Dr. Lee found no ripping, tearing, or scratch or scraping-type marks on the shirt. Dr. Lee stated that this fact "suggests that no prolonged moving contact with a soil surface occurred which would cause the type of damage commonly resulting from dragging or similar action."[141]

Dr. Lee reported that soil and grasslike materials were similarly present on the pants in the area of the rear pocket, which indicates that the pants had direct contact with a soil surface.[142] Dr. Lee reported that "[n]o dragging-type soil patterns or damage which could have resulted from dragging-type action were observed on these pants."[143]

f. <u>Bone Chip</u>

Dr. Lee examined debris collected from Mr. Foster's clothing and reported that the debris was "found to contain a bone chip."[144] Dr. Lee stated that DNA was extracted from this bone fragment and amplified, and the DNA profile generated for this bone sample was consistent with the DNA types of Mr. Foster.[145] Based on his analysis of the evidence, Dr. Lee concluded that

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was 83.1 degrees, 3.1 degrees above normal. OIC Doc. No. DC-BI-6.

[140] Lee Report at 491.

[141] *Id.*

[142] *Id.* at 492.

[143] *Id.*

[144] *Id.* at 130, 243, 493.

[145] *Id.*

"[t]his bone chip originated from Mr. Foster and separated from his skull at the time the projectile exited Mr. Foster's head."[146]

g. Pants Pocket and Oven Mitt

William Kennedy, Associate White House Counsel, eventually took possession of Mr. Foster's car on behalf of the Foster family after the Park Police released it on July 28, 1993. Mr. Kennedy maintained contents of the car that had not been taken into evidence by the Park Police, and he produced those contents to investigators from Mr. Fiske's Office.[147] The contents included a kitchen oven mitt that had been in the glove compartment in Mr. Foster's car (the mitt is depicted in the glove compartment in the Park Police photographs of the car taken at the impoundment lot on July 21).[148]

Dr. Lee's examinations of this oven mitt and of Mr. Foster's pants (taken into evidence by the Park Police at the autopsy on July 21) produced circumstantial evidence relevant to the investigation.

Dr. Lee reported that "[m]acroscopic and microscopic examination of the inside of the front pants pockets revealed the presence of fibers and other materials, including a portion of a sunflower seed husk in the front left pocket. Instrumental analysis of particles removed from the pocket surface revealed the presence of lead. These materials were also found inside the oven mitt located in the glove compartment of Mr. Foster's ve-

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[146] *Id.*

[147] Kennedy 302, 5/6/94, at 11-12; Attorney 302, 6/16/94, at 1.

[148] Investigators Rolla and Braun also recalled the oven mitt in the glove compartment of the car on July 20. Braun OIC, 2/9/95, at 95-96; Rolla 302, 4/17/96, at 6.

hicle. . . . The presence of these trace materials could indicate that they share a common origin. These materials in the pants pocket clearly resulted from the transfer by an intermediate object, such as the Colt weapon."[149]

As noted, Dr. Lee also examined the oven mitt recovered from Mr. Foster's car. He reported: "Dark particle residues were located inside of the oven mitt. Instrumental analysis revealed the presence of the elements lead and antimony in these particles; this finding could indicate that an item which had gunshot residue on it, such as the revolver . . ., came in contact with the interior of [the oven mitt]."[150]

Dr. Lee further stated that "[s]unflower-type seed husks were located on the inner surfaces of this oven mitt. These sunflower seed particles were similar to the sunflower seed husks found in Mr. Foster's front, left pants pocket."[151] Dr. Lee stated that "[t]his finding suggests that the sunflower seed husk found inside the pants pocket could have been transferred from the oven mitt through an intermediate object, such as the revolver."[152]

Virtually all theories that the manner of death was not suicide assume that Mr. Foster did not previously possess the gun recovered from his hand at Fort Marcy Park. Apart from a variety of other compelling circumstantial and testimonial evidence (discussed below) that the gun belonged to Mr. Foster, the evidence regarding the pants pocket and oven mitt also tends to link Mr.

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[149] Lee Report at 492-93.

[150] *Id.* at 494.

[151] *Id.*

[152] *Id.*

Foster to the gun. Mr. Foster was found by police and rescue personnel with the gun that fired the fatal shot in his hand, and the oven mitt was found in the glove compartment in his car. There is no evidence, moreover, that anyone other than Mr. Foster did place or would have placed this or any other gun into Mr. Foster's pants pocket *and* into the oven mitt. Those pieces of evidence, when considered together and with all of the other evidence, tend to link Mr. Foster to the gun and thus tend to refute a theory that the manner of death was not suicide. The evidence regarding the pants pocket and oven mitt does not itself compel a finding as to location of death, but it is consistent with a scenario in which Mr. Foster transported the gun from the Foster home in the oven mitt,[153] and carried the gun in his pants pocket as he walked from his car in Fort Marcy Park to the berm near the second cannon.

h. Hairs and Fibers

In debris collected from Mr. Foster's clothing, the FBI Laboratory reported finding two blond to light brown head hairs of Caucasian origin that were suitable for comparison purposes and dissimilar to those of Mr. Foster.[154] The hairs did not appear to have been

[153] Statements by Foster family members provide circumstantial support for this part of the scenario. Lisa Foster and the Fosters' older son indicated that the oven mitt was usually in the kitchen, and they were unable to explain why it might have been in the Honda. Lisa Foster 302, 4/7/95, at 8; Older Son 302, 4/7/95, at 4.

[154] FBI Lab Report, 5/9/94, at 11; OIC Investigators' Memorandum, 3/2/95, at 4 (Lab Conference). As explained above, the clothing was packaged together before trace evidence was obtained, and particular trace evidence cannot be conclusively linked to particular items of clothing that Mr. Foster was wearing at the time of his death.

forcibly removed.[155] Hair evidence can become important or relevant in a criminal investigation when there is a known suspect and a significant evidentiary question whether the suspect can be forensically linked to another person (a rape or murder victim, for example) or to a particular location.[156] If the suspect is a stranger to the victim or the scene, the presence of the suspect's hair is relevant in assessing whether he or she had contact with the victim or scene. In this case, however, the only known individuals who reasonably might have been compelled to provide hair samples were persons already known to have had contact with Mr. Foster.

The FBI Laboratory reported 35 definitive carpet-type fibers in the debris collected from the clothing. Of those fibers, 23 were white fibers. OIC investigators sought to determine a possible source for the fibers[157] — for the white fibers in particular, in light of the number of white fibers in comparison to the limited number of fibers of other colors.[158] The logical known sources for possible comparison were carpets from locations with which Mr. Foster was known to have been in contact—his car, home, and workplace. OIC

[155] OIC Investigators' Memorandum, 3/2/95, at 4 (Lab Conference).

[156] *See Crime Scene Investigation* 4-5 (Lee ed. 1994) (discussing importance of evidence linking a suspect with a victim).

[157] Carpet fibers cannot be conclusively identified as having a specific origin but can be identified for consistency with a particular origin. OIC Investigators' Memorandum (Lee).

[158] The remaining 12 were various colors, including blue gray, blue, gold-brown, light brown, gray, pink, and orange. No more than three fibers of any of these colors was found. OIC Investigators' Memorandum (FBI Lab Reports on Fibers). The variety of colors suggests that those fibers did not originate from a single carpet.

investigators obtained carpet samples from those sources, including from a white carpet located in 1993 in the house in Washington where Mr. Foster lived with his family. The FBI Laboratory determined that the white fibers obtained from Mr. Foster's clothing were consistent with the samples obtained from that carpet.[159]

In sum, therefore, the carpet fiber evidence—the determination that the white fibers were consistent with a carpet from the Fosters' house and the variety and insignificant number of other fibers—does not support speculation that Mr. Foster was wrapped and moved in a carpet on July 20.[160] Indeed, the fiber evidence, when considered together with the entirety of the evidence, is inconsistent with such speculation.

3. Eyeglasses

When found, Mr. Foster's body was located on a steep berm with his head higher than his feet and his feet pointed essentially straight down the berm. Mr. Foster's eyeglasses were recovered by Park Police Technician Simonello approximately 13 feet below Mr. Foster's feet.[161]

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[159] *Id.* The Laboratory also determined that four of the non-white fibers were consistent with samples obtained from the White House or Mr. Foster's car. *Id.*

[160] In addition, one of the 23 white carpet-type fibers was scraped from Mr. Foster's jacket and tie. That also contrasts with such speculation; the jacket and tie were in Mr. Foster's car at Fort Marcy (and not on his body) and were subsequently packaged separately from the other clothing.

[161] A report by Technician Simonello states: "Approximately 13 ft. downslope from the victim's feet (west) I observed a pair of prescription glasses laying on the ground." USPP Report (Simonello)

a. Blood

Dr. Lee stated that "[b]loodstains were found on both sides of the lenses" of Mr. Foster's eyeglasses.[162] These bloodstains "were less than or equal to 1 mm in size. In addition, blood-like and tissue-like materials were identified on the [fingerprint] lifts of the eyeglasses."[163]

b. Gunpowder

The FBI Laboratory found one piece of ball smokeless powder on the eyeglasses, and it was "physically and chemically similar" to the gunpowder identified in the cartridge case.[164]

c. Summary: Glasses

Dr. Lee stated that the above facts "support the interpretation that Mr. Foster was wearing his eyeglasses at the time the gun was discharged."[165] The analyses and conclusions of the experts and investigators in this and prior investigations reveal that the location where the glasses were found is consistent with the conclusion that Mr. Foster was wearing the glasses at the time the shot was fired.[166]

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at 1. The prescription was consistent with Mr. Foster's prescription, and the glasses contained marks on the earpieces consistent with Mr. Foster's habit of chewing the earpieces. FBI Lab Report, 5/9/94, at 11-12; Lisa Foster 302, 5/9/94, at 14.

[162] Lee Report at 493.

[163] *Id.*

[164] FBI Lab Report, 5/9/94, at 8; *see also* Lee Report at 489, 493.

[165] Lee Report at 493.

[166] *E.g.*, OIC Investigators' Memorandum (Lee).

4. Surrounding Area

a. Gunshot Residue in Soil

As part of his examination, Dr. Lee went to Fort Marcy Park with OIC investigators and obtained soil and other materials from the berm on which Mr. Foster's body was found.[167] Dr. Lee examined the soil samples; he reported that "[a] few unburned and partially deformed gunpowder-like particles were recovered from the soil in the area where Vincent Foster's body was found."[168] It cannot be determined "[w]hether these particles were deposited on the ground at the time of Mr. Foster's death or at any other period of time."[169]

b. Possible Bloodstains on Vegetation at Scene

Dr. Lee stated that one photograph of the scene "shows a view of the vegetation in the areas where Mr. Foster's body was found. Reddish-brown, blood-like stains can be seen on several leaves of the vegetation in this area."[170] He also noted that "[a] close-up view of some of these blood-like stains can be seen in [a separate] photograph."[171]

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[167] Lee Report at 422. No intensive review of the area under and around Mr. Foster's body occurred on July 20 or during the 1993 Park Police investigation.

[168] *Id.* at 489.

[169] *Id.*

[170] *Id.* at 495.

[171] *Id.* Dr. Lee said that "[i]f these stains are, in fact, blood spatters, this finding is consistent with the shot having been fired at the location where Mr. Foster's body was found." *Id.*

5. Contents of Bodily Fluids

During the 1993 investigation, the Laboratory of the Virginia Division of Forensic Science found that the blood, vitreous humor, and urine were negative for alcohols and ketones.[172] The Laboratory did not detect "phencyclidine, morphine, cocaine, [or] benzoylecgonine"; "other alkaline extractable drugs"; or "acidic [or] neutral drugs."[173]

The FBI Laboratory later conducted more sensitive testing and determined that the blood sample from Mr. Foster contained trazodone.[174] Trazodone was an antidepressant medication prescribed as Desyrel by Mr. Foster's physician on July 19, 1993, and Mr. Foster took one tablet that night, according to his wife.[175]

C. Review by Pathologists

Because of the importance of the forensic evidence to the conclusion about cause and manner of death, the OIC retained Dr. Brian Blackbourne as an expert pathologist to assist the investigation. Dr. Blackbourne

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[172] Commonwealth of Virginia, Division of Forensic Science, Certificate of Analysis, Case No. 93-353, 7/26/93 (Huynh).

[173] *Id.*

[174] FBI Lab Report, 5/9/94, at 8.

[175] Lisa Foster 302, 5/9/94, at 13. She produced to investigators the prescription container with 29 tablets enclosed. The label on the container indicated that it initially had contained 30 tablets.

Dr. Berman reported that "[o]ne pill would have had no significant therapeutic effect as the majority of those prescribed this drug do not report benefit for at least two weeks' treatment." Berman Report at 6.

The Lab also detected diazepam and nordiazepam below recognized therapeutic levels. FBI Lab Report, 5/9/94, at 8. Diazepam is valium, and nordiazepam is its metabolite.

reviewed the relevant reports, photographs, and microscopic slides; toured Fort Marcy Park; and interviewed Dr. Beyer, Dr. Haut, and FBI and Virginia laboratory personnel. He provided a report to the OIC summarizing his work on the forensic issues and setting forth his analysis.

Dr. Blackbourne concluded that Mr. Foster "died of a contact gunshot wound of the mouth, perforating his skull and brain."[176] Dr. Blackbourne based that conclusion "upon the autopsy report, diagrams and photographs and my examination of the microscopic slides of the entrance wound in the soft palate and posterior oropharynx which demonstrated excessive soot."[177]

Dr. Blackbourne concluded that Mr. Foster was alive at the time the shot was fired. Dr. Blackbourne based this conclusion

> upon the autopsy report and photographic evidence that there was bleeding beneath the scalp about the

[176] Blackbourne Report at 2. Mr. Fiske's Office previously retained a panel of pathologists to prepare a report. The pathologists were Dr. Charles S. Hirsch, Chief Medical Examiner for the City of New York; Dr. James L. Luke, Investigative Support Unit, FBI Academy; Dr. Donald T. Reay, Chief Medical Examiner for King County, Washington; and Dr. Charles J. Stahl, Medical Examiner, Armed Forces Institute of Pathology, Washington, D.C. These pathologists likewise reported that "the bullet wound of Mr. Foster's head and brain, with its vital reaction, represents the definitive cause of death." Pathologists' Report at 1.

[177] Blackbourne Report at 2. In his report, Dr. Lee similarly stated—based on examination of the scene photographs, the medical examiner's report, and the autopsy photographs—that "it is clear that Mr. Foster died as a result of a single gunshot wound," that "[t]he entrance of this wound was in his mouth," and that "the bullet appears to have exited through the back of Mr. Foster's head." Lee Report at 486.

> gunshot exit wound and beneath the fractures of the back of the skull. Such bleeding requires the heart to be beating at the time these injuries occurred. The autopsy report and my microscopic observation that blood was aspirated into the lungs requires that the person be breathing in order to suck the blood into the small air sacks of the lung.[178]

Dr. Blackbourne concluded that Mr. Foster "fired the gun with the muzzle in his mouth, his right thumb pulling the trigger and supporting the gun with both hands and with both index fingers relatively close to the cylinder gap (the space between the cylinder and the barrel)."[179] Dr. Blackbourne reasoned that "the dense deposit of soot on the soft palate and oropharynx indicated that the gun was discharged in close proximity to the soft palate."[180] In addition, the DNA from the muzzle of the gun was consistent with that of Mr. Foster.[181] Furthermore, "[t]he right thumb was entrapped within the trigger guard by the forward motion of the trigger after the revolver was fired."[182] Finally, Dr. Blackbourne stated that "[w]hen a revolver is fired, smoke issues out of the space between the cylinder and the barrel. This smoke will be deposited on skin, clothing or other objects close to the cylinder gap. The autopsy report indicates that smoke deposits were noted on the radial aspect of both right and left index fingers. Dr. Beyer told me that there was more deposit

[178] Blackbourne Report at 2.

[179] *Id.* at 4.

[180] *Id.*

[181] *Id.*

[182] *Id.*

on the right as compared to the left index fingers."[183] Dr. Blackbourne concluded that "[a]t the time of his death Vincent Foster was not under the influence of alcohol, narcotics, [or] cocaine."[184] Dr. Blackbourne based this conclusion upon the toxicology reports of the Virginia Division of Forensic Science Toxicology Laboratory and the FBI Laboratory; a meeting with the personnel of the FBI Laboratory; and a discussion with the toxicologist for the Virginia Division of Forensic Science who performed work on the Foster case in 1993.[185]

Dr. Blackbourne concluded that the gunshot wound that caused Mr. Foster's death occurred in Fort Marcy Park at the location where his body was discovered.[186] Dr. Blackbourne based this conclusion

> upon the fact that he would be immediately unconscious following the gunshot wound through the brain. Movement of the body, after the gunshot, by another person(s) would have produced a trail of dripping blood and displaced some of his clothing. If he had been transported from another location, such movement would have resulted in much greater blood soilage of his clothing (as was seen when he later was placed in a body bag and transported to

[183] *Id.* Similarly, the panel of pathologists concluded that the large quantity of gunpowder residue on the soft palate "indicates that Mr. Foster placed the barrel of the weapon into his mouth with the muzzle essentially in contact with the soft palate when he pulled the trigger." Pathologists' Report at 1. In addition, the pathologists noted that DNA consistent with that of Mr. Foster had been recovered from the muzzle of the revolver. *Id.*

[184] Blackbourne Report at 3.

[185] *Id.* at 4.

[186] *Id.* at 2.

> Fairfax Hospital and later to the Medical Examiner's Office). No trail of dripping blood was observed about the body on the scene. His clothing was neat and not displaced. The blood beneath the head and on the face and shoulder is consistent with coming from the entrance and exit wounds.[187]

Dr. Blackbourne concluded that the blood draining from the right nostril and right side of the mouth, as documented by Polaroid scene photographs, suggests that an early observer may have caused movement of the head.[188] Dr. Blackbourne based this conclusion

[187] *Id.* at 3. The panel of pathologists retained by Mr. Fiske's office similarly concluded that "death occurred where the body was found at Fort Marcy Park, Virginia. The relatively pristine nature of the exposed skin surfaces of the deceased and of his clothing precludes any other scenario. Substantially greater contamination of skin surfaces and clothing by spilled and/or smeared blood would have been unavoidable, had the body been transferred postmortem to the place where it was found. . . . There was no such contamination when the body was examined and photographed at the scene." Pathologists' Report at 2. The report continued: "[A] pool of blood was, in fact, found under the head of the deceased when the body was turned, and the upper back of his shirt was noted to be blood soaked." *Id.* at 3.

[188] Blackbourne Report at 4. Dr. Blackbourne stated that a mark on the side of the right upper neck, just below the jawline, seen in autopsy photographs, represents small fragments of dried blood and does not represent any form of injury. *Id.* Dr. Blackbourne based this conclusion upon his "experience in many autopsies. Blood dries overnight, prior to the autopsy. If one is not meticulous in washing the body prior to photographing it, small portions of blood may remain adherent to the skin. This mark is composed of two rectangular shaped dark spots approximately 2mm X 3mm. These marks have none of the features of a gunshot wound or other antemortem trauma." *Id.* at 5. Similarly, Dr. Hirsch, an expert pathologist retained during the Fiske investigation, examined the autopsy photographs and stated that

upon the fact that blood will pool in the mouth and nasopharynx while the heart is still beating following a gunshot wound of the back of the mouth. This blood may drain toward the dependent side of the head if the volume of blood exceeds the capacity of the mouth. There will be a thin trickle. The broad area of blood covering the right lower face, chin and right side of his neck and extending over the right shoulder and right collar of his shirt would result from the sudden drainage of all of the blood in his mouth. . . . This event occurred prior to taking the Polaroid scene photographs.[189]

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he saw "flecks of dried blood" depicted on the neck and that he saw "nothing in the photographs, and there certainly is nothing described in the autopsy to make me suspect that there is in any way any trauma to the side of his neck." OIC, 2/16/95, at 43, 45. The panel of pathologists further stated that, apart from the wound through the back of the head, "there was no other trauma identified." Pathologists' Report at 1. Dr. Beyer, who conducted the autopsy, was shown an enlarged autopsy photograph of the side of the neck, and said, "I see blood, but I don't see any trauma." OIC, 2/16/95, at 15. Dr. Lee reviewed the scene and autopsy photographs and evidence and indicated that there was only an entrance wound through the back of the mouth and an exit wound out the back of the head. Lee Report at 89-92, 486. The scene and autopsy photographs were reviewed during Congressman Clinger's probe and the Senate's inquiry into Mr. Foster's death, both of which concluded that he committed suicide by gunshot through the back of the mouth out the back of the head. Moreover, as outlined above, all six persons who attended the autopsy, and who therefore were able to examine the body itself, confirmed that there were no wounds on Mr. Foster's body other than the mouth-head bullet wound. *See supra* note 77, at 33-34.

[189] Blackbourne Report at 4. Similarly, the panel of pathologists stated: "A broad transfer-type blood smear was present at the right side of the chin and neck, precisely corresponding to a similar blood stain of the right collar area of the shirt. For obvious

Based on all of the above evidence, analyses, and conclusions, Dr. Blackbourne concluded that "Vincent Foster committed suicide on July 20, 1993 in Ft. Marcy Park by placing a .38 caliber revolver in his mouth and pulling the trigger. His death was at his own hand."[190]

VI. ISSUES RELATING TO EVIDENCE AT SCENE

Evidence from the scene and regarding the activities and observations of persons in and around Fort Marcy Park on July 20, 1993, raised certain issues requiring further investigative work.

A. Blood Transfer Stain

The Polaroids of the body at the scene depict, and many witnesses who observed the body at the scene describe, the position of the head as facing virtually straight, not tilting noticeably to one side or the other. The Polaroids depict a blood transfer stain in the area of the right side of the face. As explained in previous sections, the expert pathologists and Dr. Lee analyzed this blood evidence and the Polaroid photographs. They concluded, based on the blood transfer stain, that the head made contact with the right shoulder at some

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reasons, the head must have been facing to the right when the body was found or have been turned to the right when the body was being examined at the scene. In either circumstance, blood accumulated in the nose and mouth from the bullet defect of the soft palate and base of the skull would have spilled over the face and soiled the right shoulder and collar of the shirt." Pathologists' Report at 3. The transfer stain issue is discussed further below.

[190] Blackbourne Report at 5. The panel of pathologists reached the same conclusion. Pathologists' Report at 4. As reflected by the findings of the various pathologists and investigators, the fact that the gun was found in Mr. Foster's hand is consistent with this conclusion.

point before the Polaroids were taken. The testimony and contemporaneous reports point to the conclusion that rescue personnel at the scene handled the decedent's head to check for vital signs and open an airway.[191]

B. Quantity of Blood

Those who saw the body at Fort Marcy Park *after* it was lifted and rolled over at the scene described a quantity of blood behind Mr. Foster's head, under his body, and on the back of his shirt.[192] A reporter and

[191] Fornshill OIC, 1/11/95, at 92-93, 104, 105 (describing movements of FCFRD personnel Hall and Gonzalez around head of body); Hall Senate Deposition, 7/20/94, at 22 ("I recall attempting to check the carotid pulse."); Gonzalez Senate Deposition, 7/20/94, at 19 ("I believe Todd [Hall] did" check the pulse.); Gonzalez OIC, 1/10/95, at 56-57 (Hall may have checked for pulse); USPP Report (Hodakievic) at 1 ("Gonzoles [sic] notified me that . . . Gonzoles [sic] and Hall checked the body for vital signs and found none."); Iacone OIC, 1/10/95, at 22 (Iacone checked for pulse); USPP Report (Ferstl) at 1 ("Ofc. Fornshill advised that a medic checked the subjects [sic] neck for a pulse"); Gavin OIC, 2/23/95, at 15 (learned at scene that FCFRD personnel had checked for vital signs); USPP Report (Rolla) at 1 (FCFRD personnel "felt for a pulse in the carotid artery and got none."). The action of checking for vital signs and an airway may have caused some spillage of blood and may have caused the head to make contact with the right shoulder.

[192] Abt OIC, 2/9/95, at 30 ("We noted that there was a good amount of blood again on the back portion of the shirt and the collar, things like that."); Haut OIC, 2/16/95, at 13 ("[o]n the ground, underneath the head, there was a pool of congealed blood"); Hodakievic 302, 2/7/95, at 4 (recalls "lot of blood" underneath the decedent's head); Hodakievic OIC, 2/14/95, at 16 (describing blood on ground and on back of head and shirt when body moved); USPP Report (Rolla) at 1-2 ("I observed blood . . . underneath his head . . . . I rolled the decedent over and

Park Police officers separately visited the scene on July 21 and 22, 1993, and stated that they could identify the spot where the body had been located by the blood soaked into the ground.[193] A reporter placed a stick into the ground where the blood spot was located and estimated the blood depth at one-eighth inch.[194]

In addition, as Dr. Lee stated regarding the quantity of blood, the photographs at the autopsy reveal blood staining on the clothes that was not depicted at the scene.[195] Moreover, Dr. Beyer, who performed the autopsy, found a large amount of blood in the body bag.[196] These facts indicate that still more blood drained from the body during movement from the Fort Marcy scene to the autopsy.

observed a large blood stain three quarters down the back of the decedent's shirt."); Rolla 302, 4/17/96, at 4 ("When Rolla rolled the body he observed new, wet blood pouring out of the nose and possibly the mouth of the decedent. Rolla also observed a pool of blood, approximately 4-inches across, which had been under the head and neck area. Rolla also observed the back of the shirt was soaked with blood from the collar to the waist."); USPP Report (Simonello) at 1 ("When the body was turned onto its stomach I observed a large area of blood pooled where the head had been resting. . . . I also observed a larger area of blood where the victim's back had been, coinciding with blood stains on the back of shirt."); Simonello 302, 2/7/95, at 3 ("after the body was rolled, Simonello observed a large blood pool under the head of the decedent and on the back of the decedent's shirt").

[193] Reporter 302, 4/18/96, at 1 (recalled a blood spot approximately 12 inches in diameter); Hill 302, 3/1/95, at 3 (located position of body by blood stain on the ground).

[194] 302, 4/18/96, at 1.

[195] Lee Report at 490, 494.

[196] *Id.* at 495.

There has been occasional public suggestion, premised on the supposedly low amount of blood observed at the Fort Marcy scene, that blood must already have drained from the body elsewhere and that the fatal shot therefore must have been fired elsewhere. As revealed by the foregoing descriptions of the evidence, the underlying premise of this theory is erroneous: A quantity of blood was observed at the park under the body and on the back of the head and shirt. Moreover, the suggestion fails to account for the blood that subsequently drained from Mr. Foster's body during movement to the autopsy. The blood-quantity evidence, even when considered in isolation from other evidence, does not support (and indeed contravenes) a suggestion that the fatal shot was fired at a place other than where Mr. Foster was found at Fort Marcy Park.[197]

C. Unidentified Persons and Cars

The evidence establishes that at least three cars belonging to civilians were in and around the Fort Marcy parking lot area when the first Park Police and FCFRD personnel arrived: (1) Mr. Foster's gray Honda Accord with Arkansas tags; (2) the white Nissan with Maryland tags driven by C4; and (3) the broken-down blue Mercedes driven by C6. The three cars belonging to Mr. Foster, C4, and C6 are the only cars positively identified and known to law enforcement and the OIC that were in the Fort Marcy Park parking lot area in the 6:00-8:30 p.m. time frame and that belong to persons

[197] There also are a number of other items of evidence that contradict any such suggestion, as noted elsewhere in this report.

other than FCFRD personnel, Park Police personnel, towing personnel,[198] and Dr. Haut.

During the afternoon, before Park Police and FCFRD personnel were called to the scene at Fort Marcy Park, C2 saw a man in a car next to him; C3 and C4's statements suggest the presence of at least one man in the parking lot and perhaps a jogger;[199] and C6, after her car broke down, saw a man on the entrance ramp to the parking lot who asked her if she needed a ride.[200] Law enforcement and the OIC are not aware of

[198] A tow truck came to tow C6's car after the Park Police had arrived on the scene. Hodakievic OIC, 2/14/95, at 25. A tow truck later came to tow Mr. Foster's car. Raley's Towing Receipt, Case No. 30502; USPP Impounded Car Record, Case No. 30502.

[199] According to the reports of their interviews at the scene on July 20, 1993, C3 and C4 did not see anyone in or touching Mr. Foster's car. USPP Report, 7/20/93, at 1 (C3 and C4 interview). C4 said that a contrary statement in a report of an April 7, 1994, interview was inaccurate. 302, 2/2/95, at 2. C3 said simply that, at the time he provided subsequent statements in 1994 and thereafter, "he [wa]s not at all sure" of "his specific observations." 302, 2/2/95, at 3.

[200] Officer Fornshill stated that he was told later by Park Police personnel that there were what he described as "volunteers" along one of the trails in the park. Senate Deposition, 7/12/94, at 13; OIC, 1/11/95, at 93, 94. The evidence suggests that the people referred to as "volunteers" likely were C3 and C4. The investigators found C3 and C4 in the park but no "volunteers." In addition, the Park Service has uncovered no records that any Park Service workers were in the park near 6:15 p.m. on July 20, OIC Doc. No. DC-229-1, and no other witness known to the OIC saw such workers in the park.

After initially looking at the body, Todd Hall of the FCFRD said he thought he heard someone else in the woods and subsequently saw something red moving in the woods. 302, 3/18/94, at 2. Upon discovering during the course of a later interview that there was a road in the area where he had seen the motion, Hall believed it

the identities of the persons (other than C5) described by C2, C3, C4, and C6. There is no evidence that any of those unidentified persons (or any identified persons, for that matter) had any connection to Mr. Foster's death; and the totality of the forensic, circumstantial, testimonial, and state-of-mind evidence contrasts with any such speculation.

D. Car Locks

The Park Police investigators (Braun and Rolla) who entered and searched Mr. Foster's car at Fort Marcy Park said that they were able to enter the car without keys because the car was not locked.[201] James Iacone of the FCFRD stated that he had tried at least one of the doors and that it was locked.[202] That statement contrasts with that of Ralph Pisani of the FCFRD, who said that he, Jennifer Wacha, and Iacone looked into the

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could have been vehicular traffic. 302, 4/27/94, at 2. Hall later stated that "I seen something. It was woody and I seen something go past, like a car. . . . [I]t was probably a car or truck that drove past the bushes." Senate Deposition, 7/20/94, at 17-18. In another statement, Hall said that he "believe[d] someone was down there." OIC, 1/5/95, at 20. Hall believed that he saw something orange and that it was an orange vest. *Id.* at 22-23, 28. Hall said that he told an officer (Fornshill) when he made this observation and that Fornshill did not respond. *Id.* at 23. (According to Officer Fornshill, none of the rescue personnel said anything to the effect that someone was in the area. OIC, 1/11/95, at 93.) In yet another later statement, Hall said that he did not recognize this orange flash as a person. 302, 5/13/96, at 3.

[201] Braun 302, 4/24/96, at 2; Rolla 302, 4/17/96, at 5-6; *see also* USPP Report (Simonello) at 1 (car doors "had been c[l]osed but not locked"); Ferstl OIC, 1/11/95, at 98, 101-02, 118 (saw Braun open car, believes car was unlocked).

[202] 302, 3/11/94, at 3; OIC, 1/10/95, at 34; 302, 4/29/96, at 2.

Honda, but that no one tried the doors.[203] In any event, even were Iacone's recollection more accurate than the others,[204] the statement would be of uncertain significance, inasmuch as it is, of course, possible that one or more of the four doors was locked and one or more unlocked.[205]

E. Neighborhood

OIC investigators canvassed the area surrounding Fort Marcy Park to determine whether anyone observed, heard, or had knowledge of relevant activity on July 20.[206] That effort did not yield relevant information.[207]

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[203] 302, 3/11/94, at 2-3. Wacha did not recall that anyone determined whether the car was locked. OIC, 1/10/95, at 50.

[204] Two other witnesses gave changing accounts on the locked-car issue. Gonzalez said that when he returned to the parking lot from the body, he learned that both of the civilian vehicles were locked. 302, 4/27/94, at 4. In another statement, he said "I'd be guessing" as to whether the doors to Mr. Foster's car were locked. Senate Deposition, 7/20/94, at 96-97.

In one statement, Hall said that the doors of the car were locked. OIC, 1/5/95, at 52-53. In a Senate deposition, however, Hall stated "I don't recall" in response to the question "Did you know if the car was locked?" Senate Deposition, 7/20/94, at 28.

[205] There are a number of possible scenarios consistent with the evidence in which one or more of Mr. Foster's car doors could have been locked and one or more unlocked.

[206] There is no record of any effort to canvass the neighborhood near the time of the death to determine whether anyone had seen or heard relevant information.

[207] With respect to sound, Fort Marcy Park is adjacent to the thoroughfares of GW Parkway and Chain Bridge Road; planes to and from National Airport regularly fly in patterns near the park; and security officers at the nearby Saudi Ambassador's residence on Chain Bridge Road reported that construction was ongoing at

F. Pager

A Park Police evidence control receipt indicates that at the scene, Investigator Rolla took possession of Mr. Foster's pager from his right waist area. The receipt reveals that the pager, along with other personal property such as Mr. Foster's wallet, rings, and watch, were released to the White House on the evening of July 21 to be returned to the Foster family.[208] Investigator Rolla said that Mr. Foster's pager was off when he recovered it.[209] White House records of pager messages do not indicate messages sent to or from Mr. Foster on July 20.[210]

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that time. 302, 4/20/94, at 1; 302, 4/20/94, at 2; OIC Investigators' Memorandum (Fort Marcy Park).

[208] USPP Evidence/Property Control Receipt (Rolla) at 1-2.

[209] Rolla OIC, 2/9/95, at 27. Investigator Braun also said the pager was turned off. 302, 2/7/95, at 8. Investigator Abt's notes taken at the scene also indicate that the pager was turned off.

[210] OIC Doc. No. DC-210-2620.

VII. ISSUES RELATING TO CONDUCT OF INITIAL INVESTIGATION

Certain issues related to the conduct of the initial 1993 investigation into Mr. Foster's death warrant discussion in this report.

A. Photographs

Park Police Identification Technician Simonello took 35-millimeter photographs of Mr. Foster's body and of the scene.[211] Park Police investigators also took a number of Polaroids of Mr. Foster's body and of the scene. Polaroids taken at a crime or death scene develop immediately, and thus are useful in the event that problems subsequently occur in developing other film (as occurred here[212]).

Thirteen of the Polaroids provided to Mr. Fiske's office and the OIC are of the body scene, and five are of the parking lot scene. Of the 13 Polaroids of the body scene, eight are initialed by Investigator Rolla. The backs of the other five say "from C202 Sgt. Edwards 7-20-93 on scene."[213] Officer Ferstl said that he took Polaroids and, without initialing or marking them, gave them to Sergeant Edwards, who gave them to the investigators.[214] Sergeant Edwards does not recall taking Polaroids himself.[215]

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[211] Simonello OIC, 2/14/95, at 40-42.

[212] The 35-millimeter photographs were underexposed; thus, the Polaroids were of greater investigative utility.

[213] The handwriting on these photographs is that of Investigator Abt.

[214] OIC, 1/11/95, at 85, 87. Investigator Rolla initially suggested in a Senate deposition that he had taken photographs of the back of Mr. Foster's body. Senate Deposition, 7/21/94, at 89-90. After

B. Keys

Investigator Rolla said he felt into Mr. Foster's pants pockets at the scene in looking for personal effects.[216] Later, when it became apparent to Investigators Rolla and Braun that they did not have the keys to the car, they went to the hospital to check more thoroughly for keys.[217] The hospital logs indicate that Investigators Rolla and Braun were at the morgue at 9:12 p.m.[218] Investigator Braun thoroughly searched the pants pockets by pulling the pockets inside out, and she found two sets of keys.[219] She prepared an evidence receipt

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reviewing the Polaroids, Investigator Rolla stated that he intended to take such Polaroids, but he believes Investigator Braun took the Polaroid camera back to the parking lot before Dr. Haut arrived and the body was turned. 302, 4/17/96, at 4. The records are consistent with Investigator Rolla's statement, as the time "1930" is indicated on the back of the Polaroids taken by Investigator Braun at the parking lot scene, and Dr. Haut appears not to have arrived at the park until approximately 7:40 p.m.

[215] OIC, 1/12/95, at 7, 199-203. Investigator Abt recalled Sergeant Edwards taking Polaroids, OIC, 1/12/95, at 11, but Sergeant Edwards said he only carried the Polaroid camera and the Polaroids taken by Ferstl, but does not recall taking any Polaroids himself, OIC, 1/12/95, at 7, 199-203.

[216] OIC, 2/9/95, at 34-35. Investigator Rolla removed Mr. Foster's watch, pager, and two rings from the body at the scene. USPP Evidence/Property Control Receipt (Rolla) at 1. Investigator Rolla has said that he did not reach to the bottom of the suit pants pockets at the time he took personal effects into evidence at the scene. 302, 4/17/96, at 3.

[217] Rolla, OIC, 2/9/95, at 35-36; Braun OIC, 2/9/95, at 75-76.

[218] OIC Document No. DC-108-14. The safety and security officer at the hospital stated that he escorted Investigators Braun and Rolla to the body in the morgue. He described the entire incident as "very routine." 302, 4/13/95, at 1-2.

[219] Braun 302, 4/24/96, at 3; Braun OIC, 2/9/95, at 76.

indicating that the keys were taken from the right pants pocket, and she subsequently placed the keys in an evidence locker.[220]

C. X-Rays

Although no x-rays were produced from the autopsy, the gunshot wound chart in the autopsy report has a mark next to "x-rays made." Dr. Beyer has stated that either he did not take x-rays because the machine was not functioning properly at the time, or that if he attempted to take x-rays, they did not turn out. He stated:

> I had intended to take x-rays, but our x-ray machine was not functioning properly that day. And if we took any all we got was a totally black, unreadable x-ray, so I have no x-rays in the file. . . . I could very well have tried to use it on the Foster autopsy and got an unreadable x-ray. If his wound had been a penetrating wound, where there was only a wound of entrance, and the missile was retained within the body, then there would have been a requirement

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[220] USPP Evidence/Property Control Receipt (Braun) at 1-2. The evidence indicates that no persons other than police, rescue, medical, and hospital personnel had access to the body from the time when Investigator Rolla patted the pants at the park until the time when Investigator Braun recovered the keys in the pants pocket at the hospital. Two White House officials (William Kennedy and Craig Livingstone) viewed the body at the hospital, but the hospital logs reflect that they viewed the body near 10:30 p.m., OIC Doc. No. DC- 108-13—well *after* Investigators Braun and Rolla had retrieved the keys. Moreover, a Fairfax County Police officer stationed on regular assignment at the hospital that evening and a nursing supervisor escorted Mr. Kennedy and Mr. Livingstone, and allowed them to see the body only through a glass window. Officer 302, 2/10/95, at 2.

> that I have an x-ray. Since this was a perforating wound, where there was a wound of entrance and a wound of exit, and I was going to examine the tissue through which the missile path had taken, I concluded we could proceed without the x-ray, rather than delay it six to eight hours.[221]

Dr. Beyer's assistant recalled that, at the time of the Foster autopsy, the laboratory had recently obtained a new x-ray machine and that it was not functioning properly. The assistant stated that the machine sometimes would expose the film and sometimes would not. In this case, the assistant recalled moving the machine over Mr. Foster's body in the usual procedure and taking the x-ray. He said that he did not know until near the end of the autopsy that the machine did not expose the film.[222] In addition, like Dr. Beyer and the assistant, the administrative manager of the Medical Examiner's Office recalled "numerous problems" with the x-ray machine in 1993 (which, according to records, had been delivered in June 1993).[223]

With respect to the check of the x-ray box on the report, Dr. Beyer stated that he checked that box before the autopsy while completing preliminary information on the form and that he mistakenly did not erase that check mark when the report was finalized.[224]

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[221] OIC, 2/16/95, at 17.

[222] 302, 9/11/95, at 2.

[223] 302, 1/27/95, at 1.

[224] Senate Hearing, 7/29/94, at 236, 242. The primary purpose of x-rays in this case, given the nature of the entrance and exit wounds, would have been to determine whether any bullet fragments remained in the head. Dr. Beyer said he felt "confident" without the x-rays that "you can examine the brain for a bullet or bullet fragments and identify them." OIC, 2/16/95, at 18. As previously set forth, Dr. Beyer, his assistant, and the four Park Police officers at the autopsy (Morrissette, Hill, Johnson, and Rule), all recalled that Dr. Beyer examined the head and brain (and dissected the brain) and found no bullet or fragments. *See supra* note 70, at 31-32. Officer Morrissette's report, prepared after the autopsy, stated that "Dr. Byer [sic] stated that X-rays indicated that there was no evidence of bullet fragments in the head." USPP Report (Morrissette) at 1. As explained above, however, Dr. Beyer made that statement and reached that conclusion without x-rays.

VIII. OTHER ISSUES

Several other issues have arisen and been examined by the OIC.

A. Gun Observations and Ownership

The OIC conducted investigation and analysis with respect to the gun, both as to observations of the gun at the scene and ownership of the gun.

1. Observations of Gun at Scene

According to the testimony of the first three official personnel to find the body (Park Police Officer Fornshill and FCFRD personnel Hall and Gonzalez), the gun was in Mr. Foster's hand when they found the body (although Officer Fornshill himself did not see or look for it, but rather was told of it by the others). Those statements contrast with the testimony of C5, the individual who first saw Mr. Foster's body and did not see a gun. Careful evaluation of all of the circumstances and evidence leads to the conclusion that C5 simply did not see the gun that was in Mr. Foster's hand.

First, when questioned by the OIC, C5 agreed with a statement attributed to him in an interview report that "there was extreme dense and heavy foliage in the area

and in close proximity to the body, and the possibility does exist that there was a gun on rear of hand that he might not have seen."[225] That is supported, moreover, by the testimony of several witnesses establishing that the gun was difficult to see in Mr. Foster's hand when standing in a position above the head on the top of the berm.[226] That is further confirmed by Polaroids taken from above the head that reveal the difficulty of seeing the gun from that angle.

The forensic evidence and analyses outlined above also support the conclusion that the gun was in Mr. Foster's hand when C5 saw him. As explained by the pathologists and Dr. Lee, Mr. Foster's DNA was consistent with that on the muzzle of the gun, traces of blood evidence were derived from the gun, residue was on his hand, and residues were on his shirt. In addition, an indentation mark on his thumb suggests that the gun was in the hand for some period of time. The totality of the evidence leads to the conclusion that the gun recovered from Fort Marcy Park was in fact in Mr.

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[225] OIC, 2/23/95, at 52-53. C5 also had previously reviewed and adopted the interview report containing that statement. *See* 302, 4/14/94, at 4 (reviewed and initialed by witness).

[226] Abt OIC, 2/9/95, at 27 ("It was rather difficult for me to see, because I was looking from down the hill and the decedent's hand was covering part of the top of the gun."); Arthur OIC 1/5/95, at 52 ("I remember it kind of laying underneath the right hand"); Hall Senate Deposition, 7/20/94, at 22 (did not see gun until bent over); Hodakievic OIC, 2/14/95, at 14-15 ("Yes" in response to "was it difficult to see the gun?"); Rolla Senate Deposition, 7/21/94, at 22 ("it was difficult to see his right hand and the gun because of the plant and material around there"); Simonello OIC, 2/14/95, at 16-17 (gun was a "little difficult from a distance to observe . . . . The hand almost covered it entirely.").

Foster's hand when C5 happened upon the body, but that C5 simply did not see it.[227]

There are discrepancies in the descriptions of the color and kind of gun seen in Mr. Foster's hand.[228] However, the descriptions provided by the first two persons to observe the gun, as well as of numerous others, are consistent with the gun retrieved from the scene and depicted in the on-the-scene Polaroids.[229] That gun was taken into evidence by Technician Simonello on July 20, and has been maintained by law enforcement since then.[230]

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[227] On a separate issue, C5 saw what he described as a partially filled wine bottle near Mr. Foster's body. 302, 4/14/94, at 4. Investigator Rolla observed a bottle of what he thought was wine cooler about 15 feet to the right of the second cannon, but he recalled that the bottle was empty and its label faded. 302, 4/27/94, at 3; 302, 4/17/96, at 1. The bottle is not depicted in photographs of the scene, and it was not taken into evidence by investigators or the technician on the scene.

[228] These discrepancies are created by statements of FCFRD personnel Arthur and Iacone, which themselves are not consistent. Arthur stated that the gun was blackish-brownish but not a revolver (based on the fact that he did not recall seeing a cylinder). OIC, 1/5/95, at 46-47. After viewing a photograph of the weapon in the decedent's hand, Arthur stated, according to the interview report, "My memory is, I saw a semi-automatic, however, I must have been mistaken." 302, 4/24/96, at 2. Iacone stated that the gun was a silver-colored revolver-type weapon. 302, 4/27/94, at 3; OIC, 1/10/95, at 27.

[229] *See* Gonzalez 302, 5/15/96, at 4; Gonzalez OIC, 1/10/95, at 43 (saw black or dark revolver in hand); Hall OIC, 1/5/95, at 31 (saw black gun in hand); *see also* Wacha OIC, 1/10/95, at 41-42.

[230] There are minor (but insignificant on this record) differences in descriptions by FCFRD and Park Police personnel of the estimated number of inches from Mr. Foster's right hand to his

2. **Ownership of Gun**

One follow-up investigative issue concerning the gun relates to its ownership. Virtually all theories that the manner of death was not suicide rest on an assumption that the gun did not belong to Mr. Foster. But testimony, circumstantial evidence, and forensic evidence support the conclusion that the gun did in fact belong to Mr. Foster.

Mrs. Alice Mae Foster, Mr. Foster's mother, stated that Mr. Foster, Sr., died in 1991. He had kept a revolver in a drawer of his bedside table, in addition to other guns in the house.[231] In 1991, when Mr. Foster, Sr., had been ill and bedridden for a period of time, Mrs. Alice Mae Foster had all the handguns in the house placed in a box and put into a closet. Subsequent to the death of Mr. Foster, Sr., in 1991, Mrs. Alice Mae Foster gave Mr. Foster, Jr., the box of handguns.[232]

Mrs. Lisa Foster similarly recalls that her husband took possession of several handguns from his parents'

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thigh and of the exact position of the hand and gun in relation to the thigh.

[231] In August 1994, Sharon Bowman (the sister of Vincent Foster, Jr.) found five .38 caliber cartridges at the family home in Hope. 302, 12/1/94, at 1-2. That is further evidence suggesting that Mr. Foster, Sr., possessed a .38 caliber gun or guns. FBI Laboratory examination revealed that four of the cartridges were of the same manufacture (Remington) as in the revolver found in Mr. Foster's hand; they were manufactured at a different time than the cartridge and casing recovered from Mr. Foster's gun. FBI Lab Report, 2/21/95, at 2.

[232] 302, 5/2/95, at 1-2. Mrs. Alice Mae Foster and her long- time housekeeper viewed the gun recovered from Mr. Foster's hand, but they could not specifically identify it as one of the guns previously possessed by Mr. Foster, Sr. *Id.* at 2, 4.

house near the time of his father's death.[233] She recalled that, after they moved to Washington in 1993, some guns were kept in a bedroom closet.[234] She recalled what she described as a silver-colored gun[235] (she also has referred to it as a "cowboy gun"[236]), which had been packed in Little Rock and unpacked in Washington. She also recalled a .45 caliber semi-automatic pistol. She said she found one gun in its usual location on July 20, 1993,[237] the .45 caliber semi-automatic pistol.[238] She did not find the other gun on or after July 20, 1993.[239]

On July 29, 1993, Mrs. Foster was shown a photograph of the gun retrieved from the scene and, according to the Park Police interview report, was unable to identify it from the photograph.[240] On May 9, 1994, she was shown the actual gun that was recovered and said, according to the interview report, that the gun "may be a gun which she formerly saw in her residence in Little Rock, Arkansas" and that "she may have seen the handgun . . . at her residence in Washington."[241] She stated to the OIC in November 1995, when viewing the gun recovered from Mr. Foster's hand, that it was the gun she unpacked in Washington but had not subsequently found,[242] although

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[233] 302, 5/9/94, at 16.

[234] *Id.*; 302, 4/7/95, at 7.

[235] 302, 5/9/94, at 15.

[236] 302, 11/8/95, at 3.

[237] 302, 5/9/94, at 16.

[238] 302, 11/8/95, at 3.

[239] *Id.*

[240] USPP Report, 7/29/93, at 2 (L. Foster interview).

[241] 302, 5/9/94, at 14, 15.

[242] 302, 11/8/95, at 2.

she said she seemed to remember the front of the gun looking lighter in color when she saw it during the move to Washington.[243]

Webster Hubbell stated that, on the night of Mr. Foster's death, Lisa Foster went upstairs in the Foster house with him. While there, she looked into the top of a closet, pulled out a "squared-off" gun, and said, according to Hubbell, that one of the guns was missing.[244] To Hubbell's knowledge, the "other gun" was never found at the Foster house.[245]

Sharon Bowman, one of Mr. Foster's sisters, recalled that her father kept a black revolver in a drawer of his bedside table.[246] She said that she had retrieved various handguns from her parents' house, placed them in a shoebox, and put them in her mother's closet (and Ms. Bowman said they later were given to Mr. Foster, Jr.).[247] During the 1993 Park Police investigation, John Sloan, a family friend of the Fosters, wrote a letter to Captain Hume of the Park Police, stating that he had shown Sharon Bowman a photograph of the gun. According to the letter, Ms. Bowman stated that it "looked like a gun she had seen in her father's collection," and particularly pointed out the "'wavelike' detailing at the base of the grip."[248] Ms. Bowman was later shown the revolver recovered from Fort Marcy

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[243] *Id.*

[244] 302, 1/13/95, at 8; 302, 11/30/95, at 1. In December 1994, Mr. Hubbell was convicted of federal crimes relating to his billing practices as an attorney at the Rose Law Firm in Little Rock.

[245] 302, 11/30/95, at 2.

[246] 302, 4/11/95, at 2.

[247] *Id.*; 302, 6/6/94, at 2.

[248] Letter from John Sloan to Captain Hume in U.S. Park Police file.

Park. She indicated that it looked like one that her father kept in the house in Hope, but she could not positively identify it.[249]

Mr. Foster's other sister, Sheila Anthony, said she had no personal knowledge about the gun found in Mr. Foster's hand at Fort Marcy Park.[250] She recalled, however, that her sister, Sharon Bowman, and her brother had removed guns from their father's house near the father's death.[251]

Mr. Foster's older son said he knew his father had an old .38 caliber revolver. He saw it being unpacked at their house in Washington when they moved there. Mr. Foster told his son that he had received this gun from his father (Vincent Foster, Sr.). The older son did not know where the gun was kept in Washington. The son was unable to conclusively identify the gun recovered on July 20, 1993, from Mr. Foster's hand as the one he had previously seen.[252]

Mr. Foster's younger son stated that he saw one or two handguns in a shoebox along with a number of loose bullets while unpacking in Washington. The younger son stated that these items came from his grandfather's house. He described his grandfather's guns as a small, pearl-handled gun, and one or two revolvers. He believes his father placed the guns in a closet in Washington.[253]

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[249] 302, 4/11/95, at 2.

[250] 302, 4/28/94, at 1.

[251] *Id.*

[252] Older Son 302, 4/7/95, at 3.

[253] Younger Son 302, 4/7/95, at 2.

Mr. Foster's daughter stated she recalled someone unpacking a handgun at the house when they initially moved to Washington, although she never saw any other guns in their Washington house.[254]

To sum up, the testimony establishes that, near the time of his father's death, Mr. Foster took possession of some handguns that had belonged to his father. The testimony also establishes that guns, including (according to the older son) a .38 caliber revolver, were taken to Washington by the Foster family in 1993. Mrs. Lisa Foster said that she recalls two guns in a bedroom closet in Washington, one of which was missing when she looked in the closet after Mr. Foster's death, and that the missing gun was the one found at the scene. Ms. Bowman has said the gun found at the scene looks like a gun previously kept by her father.

In addition, forensic examinations of Mr. Foster's pants pocket and the oven mitt support the conclusion that Mr. Foster carried, and thus possessed, a gun at a time close to his death. As explained above, that evidence tends to link Mr. Foster to the gun recovered from his hand.

This combination of testimonial, circumstantial, and forensic evidence supports the conclusion that the gun found in Mr. Foster's hand belonged to Mr. Foster.

B. Briefcase

There are some discrepancies in statements regarding whether a briefcase was in Mr. Foster's car at Fort Marcy Park.

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[254] Daughter 302, 4/7/95, at 3.

Mr. Foster's black briefcase was in his office on July 22 when documents in the office were reviewed by Mr. Nussbaum in the presence of law enforcement officials. Four days later, a torn note was reportedly found in that briefcase by an Associate White House Counsel. To determine whether a briefcase (and perhaps that black briefcase) was in Mr. Foster's car at Fort Marcy Park, five related questions must be considered:

1. Did those who saw Mr. Foster leave the White House on July 20 see him with a briefcase?

2. Was a briefcase observed in Mr. Foster's car at Fort Marcy Park?

3. Did the Park Police return a briefcase to the Secret Service that evening?

4. Was a briefcase in Mr. Foster's office at the White House after his death?

5. How many briefcases did Mr. Foster use?

1. Mr. Foster's Departure from the White House

Linda Tripp, Betsy Pond, and Tom Castleton—all of whom worked in the Counsel's suite of offices—said they saw Mr. Foster leave the Counsel's suite on July 20. They were interviewed separately by the Park Police on July 22, 1993.

The Park Police report of the interview with Ms. Tripp states:

> Ms. Tripp makes it a habit to notice what the staff members are taking with them when they leave the office in order to determine for herself how long she may expect them to be away from the office. *Ms. Tripp was absolutely certain that Mr. Foster did not*

carry anything in the way of a briefcase, bag, umbrella, etc. out of the office.[255]

Ms. Tripp confirmed to the OIC that this report accurately reflected her recollection.[256]

The relevant portion of the Park Police report of Ms. Pond's interview of July 22, 1993, does not address what Mr. Foster carried when he left the office. In a later interview, Ms. Pond stated that "I think I remember his jacket swung over his shoulder" and said "[n]ot that I recall" to the question whether Mr. Foster was carrying a briefcase.[257]

The Park Police report of Mr. Castleton's interview of July 22, 1993, does not address what Mr. Foster carried when he left the office. When questioned over eight months later, Mr. Castleton recalled Mr. Foster carrying a briefcase,[258] and Mr. Castleton has said that it "looked very much like the one" that was in Mr. Foster's office on July 22.[259]

The testimony of Ms. Tripp, Ms. Pond, and Mr. Castleton thus conflicts as to whether Foster carried a briefcase when he left the Counsel's suite—two saying that he did not and one saying that he did.[260]

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[255] USPP Report, 7/22/93, at 1 (emphasis added) (Tripp interview).

[256] Tripp OIC, 6/21/95, at 9.

[257] Pond OIC, 4/26/95, at 29.

[258] 302, 5/3/94, at 2.

[259] OIC, 4/4/95, at 77.

[260] An officer of the Secret Service Uniformed Division stated that he saw Mr. Foster exit the West Wing onto West Executive Drive on July 20 around lunchtime. The officer said that he does not recall Mr. Foster carrying anything. 302, 4/20/94, at 2.

2. Mr. Foster's Car at Fort Marcy

The Park Police officers who searched Mr. Foster's car at Fort Marcy Park (Braun and Rolla) stated there was no briefcase in the car.[261] The Park Police technician who inventoried the car on July 21, E.J. Smith, stated that no briefcase was found.[262] The Polaroids of the interior of Mr. Foster's car taken at Fort Marcy Park, and the photographs taken the next day at the impoundment lot, do not show a briefcase in the car. (The photos from Fort Marcy show a white canvas bag in front of the rear seat on the driver's side of the car.)

In addition, four other persons at Fort Marcy Park specifically recall looking into Mr. Foster's car but do not recall a briefcase. Officer Fornshill of the Park Police stated that he looked into the car (although not closely) but did not see a briefcase.[263] Wacha, Iacone, and Pisani of the FCFRD also said that they did not recall seeing a briefcase.[264]

Four other persons have varying, but imprecise, degrees of recollection of a briefcase in *some* car at Fort Marcy Park.

Todd Hall of the FCFRD stated in a March 18, 1994, interview[265] and in a January 5, 1995, statement to the

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[261] Braun OIC, 2/9/95, at 70 ("there is no question, there was never a briefcase in that car"); Rolla 302, 2/7/95, at 4 (report: "Rolla stated that he did not observe any briefcase in the vehicle at all"). Technician Simonello also stated that he was "certain there was no briefcase" in the car. 302, 4/17/96, at 2.

[262] 302, 2/17/95, at 2-3.

[263] OIC, 1/11/95, at 147.

[264] Iacone 302, 4/29/96, at 2; Iacone OIC, 1/10/95, at 35; Pisani OIC, 1/10/95, at 25; Wacha OIC, 1/10/95, at 51-52.

[265] 302, 3/18/94, at 3.

OIC,[266] that he recalled a briefcase of uncertain color in the car with Arkansas plates. However, in a July 20, 1994, Senate deposition, he stated: "We saw a suit coat and I think his briefcase, something like that. . . . All I know for sure was his suit coat. And I thought I may have seen, he may have had a briefcase or something in there."[267]

George Gonzalez of the FCFRD said in one statement that he saw a black briefcase/attache case in the car with Arkansas plates.[268] In a later statement, however, Gonzalez stated, "I can't say if I saw a briefcase or papers. I can't correctly say whether I saw it or not. . . . I think the tie was in there and the jacket was in there. That's what I remember. That's all I can really remember."[269] He also said that what he recalled could have been a canvas bag that was found in Mr. Foster's car.[270] Gonzalez was not present when the Park Police entered the Honda.[271]

C5 testified that he "would just about bet" that a "brown briefcase" was in the car, although he "wouldn't bet [his] life on it."[272] C5's statements and a reenactment conducted with C5 at the scene by investigators reveal, however, that C5 was describing the car of C4,

[266] OIC, 1/5/95, at 53.

[267] Senate Deposition, 7/20/94, at 17, 27.

[268] 302, 2/23/94, at 3.

[269] Senate Deposition, 7/20/94, at 95.

[270] 302, 5/15/96, at 4. That bag is clearly shown in photographs of Mr. Foster's car taken at the scene and at the impoundment lot.

[271] Senate Deposition, 7/20/94, at 94.

[272] C5 OIC, 2/23/95, at 37.

not Mr. Foster's car, when he referred to the briefcase.[273]

C2 testified that he saw a briefcase—as well as wine coolers—in a car with Arkansas plates that was parked in the parking lot. He stated: "I looked and I saw the briefcase and saw the jacket, saw the wine coolers, it was two of them. I remember exactly how they were laying in the back seat of the car."[274] (There is no other evidence that wine coolers were in Mr. Foster's car.[275])

3. Park Police Communications with Secret Service

An official Secret Service report prepared at 10:01 p.m. on July 20 states in relevant part:

> SA Tom Canavit, WFO PI squad, advised that he has been in contact with US Park Police and was assured that if any materials of a sensitive nature (schedules of the POTUS, etc.) were recovered, they would immediately be turned over to the USSS. *(At the time of this writing, no such materials were located).*[276]

[273] OIC Investigators' Memorandum, 3/1/96, at 44; C3 302, 2/2/95, at 1 (stated that he "may have had a briefcase" in C4's car).

[274] C2 OIC, 11/1/95, at 34.

[275] C3 and C4, who drove together to Fort Marcy Park, said there were wine coolers and possibly a briefcase in C4's car. C4 302, 4/7/94, at 3; C3 302, 2/2/95, at 1. Based on the estimated times provided by the witnesses, C2 would appear to have left the park before C3 and C4 arrived together.

[276] OIC Doc. No. DC-211-147 (emphasis added); *see also* Canavit 302, 8/3/95, at 2. Park Police Lieutenant Gavin's typewritten notes of that evening reflect that Canavit had inquired about "WH passes, classified docs in vehicle."

4. **Mr. Foster's Office at the White House**

White House employee Patsy Thomasson testified that she saw Mr. Foster's briefcase by the desk in Foster's office on the night of July 20 and indeed looked into the top of that briefcase for a note.[277] As noted above, the testimony of White House, Department of Justice, FBI, and Park Police personnel confirms that Mr. Foster's black briefcase was in his White House office on *July 22*, two days after his death, during the review of documents in Mr. Foster's office.

5. **Mr. Foster's Briefcase**

The OIC is aware of only one briefcase used by Mr. Foster,[278] the black briefcase that Ms. Thomasson observed in Mr. Foster's White House office on the night of July 20 and that a number of other witnesses observed there on July 22.

6. **Summary: Briefcase**

Based on careful consideration of all of the evidence, the conclusions significantly supported are: (a) Mr. Foster's black briefcase remained in his office when he left on July 20; and (b) neither it nor another briefcase was in his car at Fort Marcy Park.

C. Notification

According to Secret Service records, the Secret Service was notified of Mr. Foster's death at about 8:30

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[277] OIC, 8/31/94, at 32.

[278] *See* Gorham 302, 3/16/95, at 7; Lisa Foster 302, 4/7/95, at 6; Older Foster Son 302, 4/7/95, at 4. Mr. Foster also possessed a large brown litigation bag that was seen in his office on July 22 during the review of documents.

p.m. Eastern time on July 20.[279] The records reflect that various White House officials were then contacted.[280]

An Arkansas Trooper has stated that, while on duty at the Arkansas Governor's Mansion, he was notified of Mr. Foster's death by Helen Dickey, at the time a 22-year-old personal assistant of the Clintons who lived on the third floor of the White House Residence.[281] The trooper described Dickey as "hysterical" and "very upset" when she called.[282] The trooper, who was working a shift until 10:30 p.m. Arkansas time that night,[283] stated that Dickey called him before 7:30 p.m. Arkansas time (8:30 p.m. Eastern time); according to the interview report, he said "he could possibly be mistaken about the time the call from Dickey was received. The call could have been as late as 8:30 PM, Arkansas time. However, he still felt his best recollection was that the

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[279] OIC Doc. No. DC-211-147.

[280] *Id.* The Secret Service records reveal that David Watkins and Craig Livingstone were the first two White House officials notified (they were notified by different Secret Service personnel). *Id.*

[281] 302, 11/9/95, at 2. The trooper said that Dickey's conversation was "very disjointed," *id.*, and that, although he could not recall her precise words, Dickey told him that Mr. Foster had committed suicide in his car at the White House. 302, 6/2/95, at 1. The trooper said that he learned later that Mr. Foster committed suicide at Fort Marcy Park. *Id.* In addition to the other evidence, the evidence regarding Mr. Foster's car (photographs of its interior and statements about the search of it) clearly demonstrates that Mr. Foster did not commit suicide there.

[282] 302, 6/2/95, at 1; 302, 11/9/95, at 2.

[283] 302, 11/9/95, at 1.

call was received sometime between 4:30 PM and 7:30 PM [Arkansas time]."[284]

Helen Dickey stated that she was first notified of Mr. Foster's death by an employee of the White House Usher's Office at about 10:00 p.m. and that she became very upset.[285] (The Dickeys had lived next door to the Fosters in Little Rock when Helen was younger.[286]) She then contacted her mother in Virginia and her father in Georgia from a phone on the second floor of the White House Residence.[287] Dickey stated that she later called (from a different phone) the Arkansas Governor's Mansion and talked to the trooper at approximately 10:30 p.m. Eastern time.[288]

There are two other pieces of relevant evidence with respect to Ms. Dickey's statement. First, Ms. Dickey's diary entry for July 20 (written within a few days of the event) states in relevant part:

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[284] *Id.* at 3. Another Arkansas trooper stated that the first trooper called him soon after the Dickey call. This second trooper "placed the time of this telephone call at approximately 6:00 PM" Arkansas time. 302, 11/9/95, at 1.

[285] 302, 2/7/96, at 1.

[286] Dickey 302, 10/31/94, at 1.

[287] Dickey 302, 2/7/96, at 2.

[288] *Id.* at 3. White House Residence phone records indicate that a call was placed to the number of Dickey's father at 10:06 p.m. OIC Doc. No. DC-95-7; Dickey 302, 2/7/96, at 2. A call to the Arkansas Governor's Mansion is not reflected on these records. As indicated, the call may have been made from a phone in the White House not on the floors of the White House Residence: The Usher's Office employee who notified Dickey recalls Dickey making a call, but not in the Residence, soon after he had notified her. 302, 5/21/96, at 2. Complete records for such calls are not available.

> I watched [Larry King Live] and about 10:30 [the Usher's Office employee] came up and told me they had found Vince Foster's body and that he'd killed himself. I waited for the punchline and lost it. I called Mom and Dad . . . . We went to Lisa's, and everyone was there . . . .[289]

Second, the Usher's Office employee confirmed that he notified Ms. Dickey of Mr. Foster's death shortly after 10:00 p.m. and said that Ms. Dickey immediately became hysterical, started screaming and crying, and ran downstairs.[290] The Usher's Office employee "firmly believes he was the first to inform Dickey of the news of Foster's death because of her extreme reaction to the news."[291]

The totality of the evidence—including the diary entry, the testimony of the Usher's Office employee, and the lack of any other evidence that White House or Secret Service personnel had knowledge of Mr. Foster's death at a time earlier than when the Park Police first notified the Secret Service—does not support a conclusion that Ms. Dickey knew about Mr. Foster's death at some earlier time.[292]

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[289] OIC Doc. No. DC-348-8.

[290] 302, 5/21/96, at 2.

[291] *Id.*

[292] Precise recollections of time, if not tied to a specific event that can be documented as having occurred at an exact time, can, of course, be imprecise or inaccurate. Here, the recollection is tied neither to a specific event nor to an exact time. The recollection instead is of a general three-hour period of time in which the call might have been received. The recollection is not reflected in a contemporaneous document.

D. Search for Bullet

During the Park Police, Fiske, and OIC investigations, searches were conducted of Fort Marcy Park for the bullet that caused Mr. Foster's death.

On July 22, 1993, four Park Police personnel (Hill, Johnson, Rule, and Morrissette) searched with a metal detector the immediate area where the body was found. Their search for the bullet was unsuccessful.

Investigators in Mr. Fiske's Office conducted a search in the area where Mr. Foster's body was found. Their search for the bullet fired from Mr. Foster's gun was unsuccessful.[293]

With the assistance of Dr. Lee, the National Park Service, and a large number of investigators, the OIC organized a broader search of Fort Marcy Park for the fatal bullet. The search was led by Richard K. Graham, an expert in crime scene metal detection. The search plan was devised utilizing information obtained through ballistics tests performed by the Army Research Laboratory, Aberdeen Proving Grounds, Maryland.

The search did not locate a bullet fired from the gun recovered from Mr. Foster's hand. That the search did not uncover the fatal bullet does not affect the conclusion that Mr. Foster committed suicide in Fort Marcy Park. Because a search covering the maximum range estimates "would have included a vast area . . ., a search which was limited in scope to the highest probability areas, closer to the minimum range estimates, was undertaken."[294] In other words, while the OIC search covered a broader area than previous

[293] Fiske Report at 47.

[294] 302, 9/12-10/31/95, at 4 (Investigators' Report of Search).

searches, "the maximum range estimates" predicted the possibility that "the bullet could have cleared the tree tops in Ft. Marcy and landed well outside the park."[295] Moreover, although lines ultimately were laid out within the park along the outer limits of a 90 degree arc to a distance of 175 meters,[296] which represented the "highest probability areas,"[297] a full search of even the 90 degree-175 meter range would have included areas outside the park that were not searched.[298] In addition, because "dense foliage and trees surround the area where Foster's body was discovered, and since there is a . . . cannon approximately 12.5 feet directly behind the location where the body lay, there is a distinct possibility the bullet's trajectory was altered due to its striking or ricocheting off a natural or man-made obstruction."[299] Another variable is that "Foster's head could have been turned to one side or the other when the shot was fired."[300]

IX. STATE OF MIND

In a death investigation, state-of-mind evidence can buttress the forensic and other evidence and, in that respect, is an issue within the scope of the investigation. For that reason, the OIC intensively examined Mr. Foster's state of mind and activities before his death. The OIC reconstructed and examined previously unreviewed documents from Mr. Foster's White House office. The OIC sought relevant documents from

[295] *Id.*

[296] *Id.* at 7.

[297] *Id.* at 4.

[298] *Id.* at 7-8.

[299] *Id.* at 4.

[300] *Id.* at 5.

other sources. The OIC interviewed Mr. Foster's wife, sisters, mother, children, and other relatives; numerous friends in Arkansas and Washington; many colleagues who worked closely with him at the Rose Law Firm or the White House; and various other persons with potentially important information. During this effort, the OIC gathered extensive evidence relating to Mr. Foster's state of mind and activities.

The OIC is grateful to the Foster family members—including Alice Mae Foster, Lisa Foster, Sharon Bowman, Sheila Anthony, Beryl Anthony, and the Foster children, among others—for cooperating with this and prior investigations under painful and difficult circumstances. Lisa Foster and Mr. Foster's mother, Alice Mae Foster, not only spoke with OIC investigators at some length, but also provided additional information and assistance at their homes in Arkansas.

A. Dr. Berman's Analysis

Suicide, perhaps contrary to popular understanding, is a common manner of death in the United States. According to the Centers for Disease Control (CDC), suicide was the ninth leading cause of death among Americans in the period from 1980 through 1992. The CDC's statistics reveal that more individuals in the United States died by suicide than by homicide in every year since 1981.[301] In the United States in 1993, 31,102 individuals committed suicide, and 18,940 of them committed suicide with a firearm.[302] During 1993,

[301] Centers for Disease Control and Prevention, *Suicide in the United States, 1980-1992* 2 (1995).

[302] These figures were provided by the Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, Division of Violence Prevention.

therefore, there were approximately 85 suicides per day, and 52 suicides by firearm per day, in the United States.

The OIC retained Dr. Alan Berman to review and analyze state-of-mind evidence gathered by the OIC in the course of its investigation. Dr. Berman, as noted above, has extensive experience and expertise in the study of suicide. He examined the evidence and reported his findings to the OIC.

In his report, Dr. Berman first noted that "[d]escriptors used by interviewees with regard to Vincent Foster's basic personality were extraordinarily consistent in describing a controlled, private, perfectionistic character whose public persona as a man of integrity, honesty, and unimpeachable reputation was of utmost importance."[303]

Mr. Foster's life, after "arriving in Washington, was filled with long, intense and demanding hours of work."[304] Dr. Berman noted that Mr. Foster's May 8 commencement address to the University of Arkansas School of Law was "replete with reflections upon and regret regarding the changes wrought by his experiences in Washington."[305] Mr. Foster had "uncharacteristically . . . talked of quitting,"[306] but considered a return to Little Rock to be a "humiliation."[307]

[303] Berman Report at 3. Dr. Berman noted that "[r]ecent studies . . . have documented a significant relationship between perfectionism and both depression and suicidality, particularly when mediated by stress." *Id.* at 13.

[304] *Id.* at 3.

[305] *Id.* at 5.

[306] *Id.* at 13.

[307] *Id.* at 7.

Dr. Berman reported that "[m]istakes, real or perceived, posed a profound threat to his self-esteem/self-worth and represented evidence for a lack of control over his environment. Feelings of unworthiness, inferiority, and guilt followed and were difficult for him to tolerate. There are signs of an intense and profound anguish, harsh self-evaluation, shame, and chronic fear. All these on top of an evident clinical depression and his separation from the comforts and security of Little Rock. He, furthermore, faced a feared humiliation should he resign and return to Little Rock."[308] The torn note "highlights his preoccupation with themes of guilt, anger, and his need to protect others."[309]

Dr. Berman noted that Mr. Foster's admission to his sister on the Friday before his death that he was depressed was a "profound expression of his depression."[310] Dr. Berman also noted Mr. Foster's July 19 call to Dr. Larry Watkins in Little Rock, during which Mr. Foster referred to symptoms of a mild depression and to stress, criticism, and long hours.[311]

Dr. Berman stated that Mr. Foster was "not a help-seeker"[312] and was "reluctant to seek help" although he was "[a]ware he was in trouble psychologically."[313] Dr. Berman stated that "[t]his difficulty accepting the vulnerable position is common to successful executives."[314] Dr. Berman stated that "[b]y the Friday before his

[308] *Id.* at 14.

[309] *Id.* at 4.

[310] *Id.* at 7.

[311] *Id.* at 6.

[312] *Id.* at 13.

[313] *Id.* at 14.

[314] *Id.*

death he was desperate; calling for names of psychiatrists was a clear . . . admission of his failure. He was ambivalent and fearful about this help-seeking."[315] He ultimately "preferred the safety of his family physician . . . to the immediacy and presence of other, unknown professionals in the DC area."[316]

Dr. Berman said that Mr. Foster's "last 96 hours show clear signs of crisis and uncharacteristic vulnerability."[317] Dr. Berman concluded, furthermore, that "[t]here is little doubt that Foster was clinically depressed . . . in early 1993, and, perhaps, subclinically even before this."[318] Dr. Berman noted that there was some history of depression in the family.[319]

Dr. Berman explained that for certain executives facing difficult circumstances, "[i]n essence, death is preferred to preserve one's identity. The suicide has an inability to tolerate an altered view of himself; suicide maintains a self-view and escapes having to incorporate discordant implications about the self. These types of suicides are typically complete surprises to others in the available support system."[320]

As to why Mr. Foster was overwhelmed at that particular time, Dr. Berman explained that Mr. Foster was "under an increasing burden of intense external stress, a loss of security, a painful scanning of his environment for negative judgments regarding his performance, a rigid hold of perfectionistic self-demands, a

[315] *Id.*

[316] *Id.* at 13.

[317] *Id.* at 10.

[318] *Id.* at 9.

[319] *Id.* at 6.

[320] *Id.* at 14.

breakdown in and the absence of his usual ability to handle that stress primarily due to the impact of a mental disorder which was undertreated."[321]

Mr. Foster apparently did not leave a note that specifically refers to or contemplates suicide. Dr. Berman indicated that the great majority of persons committing suicide do *not* leave a note.[322] Dr. Berman also stated, with respect to the lack of a note in this case, that Mr. Foster was "intensely self-focused at this point; overwhelmed and out of control."[323]

As to the Fort Marcy Park location, Dr. Berman stated that Mr. Foster "was ambivalent to the end" and may have driven for a while before going to Fort Marcy Park.[324] He may have "simply and inadvertently happened upon the park or he may have purposely picked it off the area map found in his car."[325] Dr. Berman stated that Mr. Foster's suicide in Fort Marcy Park is "[s]imilar to the typical male physician who suicides by seeking the guaranteed privacy of a hotel room, and a 'do not disturb' sign."[326]

In sum, Dr. Berman, based on his evaluation of the evidence, concluded: "In my opinion and to a 100% degree of medical certainty, the death of Vincent Foster

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[321] *Id.* at 15.

[322] *Id.*

[323] *Id.* With respect to Mr. Foster's eating lunch on July 20, Dr. Berman stated that "[t]here is no study in the professional literature that has examined eating behavior prior to suicides" and that "even death row inmates, knowing they are to die within a short time, eat a last meal." *Id.* at 14.

[324] *Id.*

[325] *Id.*

[326] *Id.*

was a suicide. No plausible evidence has been presented to support any other conclusion."[327]

B. Evidence

The OIC, like other investigations before, is not aware of a single, obvious triggering event that might have motivated Mr. Foster to commit suicide. Therefore, the following is simply a brief outline of some of the evidence relevant to the ultimate determination that Mr. Foster's state of mind was consistent with suicide. This outline is not designed to set forth or to suggest some particular reason or set of reasons why Mr. Foster committed suicide. Rather, the issue for purposes of the death investigation is *whether* Mr. Foster committed suicide, and this outline is designed to show that, as Dr. Berman concluded, compelling evidence exists that Mr. Foster was distressed or depressed in a manner consistent with suicide.[328]

To begin with, in his six months in the White House, Mr. Foster was involved in work related to a number of important and difficult issues. The issues included, for example, the appointments and vetting of an Attorney General, a Supreme Court Justice, as well as many others (some of which developed into difficult situations abounding with unfavorable public comment); legal issues related to health care, such as medical

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[327] *Id.*

[328] The OIC has been mindful of and sought to comply with the requirement of restraint imposed by the Independent Counsel Reauthorization Act of 1994: The reporting requirement is not "intended in any way to authorize independent counsels to make public findings or conclusions that violate normal standards of due process, privacy or simple fairness." H.R. Conf Rep. No. 103-511, at 19 (1994).

malpractice reform; litigation related to the Health Care Task Force; the dismissal of White House Travel Office employees and the ensuing fallout from that incident; the Clintons' tax returns (which involved an issue regarding treatment of the Clintons' 1992 sale of their interest in Whitewater); the Clintons' blind trust; liaison with the White House Usher's Office over issues related to the White House Residence; and issues related to the Freedom of Information Act.[329]

The work proved to be difficult and stressful. In a letter to a friend in Arkansas on March 4, 1993, for example, Mr. Foster wrote: "I have never worked so hard for so long in my life. The legal issues are mind boggling and the time pressures are immense. . . . The pressure, financial sacrifice and family disruption are the price of public service at this level. As they say, 'The wind blows hardest at the top of the mountain.'"[330]

During that six-month period, certain other aspects of Mr. Foster's life also came under some scrutiny. For example, in May 1993, a controversy arose over membership of Administration officials in the Country Club of Little Rock, which had had no black members. Mr. Foster was a member of that club and resigned from it that month. On a copy of a May 11, 1993, newspaper

[329] This summary report is not an appropriate forum for an exposition of substantive events under investigation by the OIC—including Whitewater, Madison, and Travel Office issues—and Mr. Foster's possible relationship to those events. Those investigations have not concluded, and it thus would be inappropriate to publicly disclose evidence on such matters. In any event, much information on those subjects is publicly accessible in reports of congressional committees and federal agencies, in several books, and in numerous media articles and reports.

[330] OIC Doc. No. DC-210-5573.

article in Mr. Foster's office that mentioned the controversy, Mr. Foster wrote, "I wish I had done more."[331]

At the same time, the White House staff generally was subject to media criticism during the first six months of the Administration. Some public criticism suggested incompetence, if not malfeasance, by staff members. Mr. Foster himself was mentioned in some of the critical editorial commentary.[332] Numerous witnesses said that Mr. Foster was concerned and/or upset over the press criticism.[333] According to Mr. Foster's brother-in-law, former Congressman Beryl Anthony, Mr. Foster said words to the effect that he had "spent a lifetime building [his] reputation" and was "in the process of having it tarnished."[334] As Dr. Berman noted, reputation was clearly important to Mr. Foster. Indeed, in the May 8, 1993, commencement address, Mr. Foster said that "[d]ents to the reputation in the legal profession are irreparable" and that "no victory, no advantage, no fee, no favor . . . is worth even a blemish on your reputation for intellect and integrity." He emphasized that the "reputation you develop for intellectual and ethical integrity will be your greatest asset or your worst enemy."

[331] OIC Doc. No. DC-210-3907.

[332] *See Who Is Vincent Foster?*, Wall St. J. June 17, 1993, at A10; *Vincent Foster's Victory*, Wall St. J., June 24, 1993, at A12.

[333] *See, e.g.*, Beryl Anthony 302, 4/11/95, at 2; Sheila Anthony 302, 4/28/94, at 4; Alice Mae Foster 302, 5/2/95, at 2; Lisa Foster 302, 4/7/95, at 8; Hockersmith 302, 8/31/95, at 3; Kennedy 302, 5/6/94, at 4-5; Lindsey 302, 6/22/94, at 2; Lyons OIC, 7/25/95, at 19-21; Scott 302, 6/9/94, at 3; Thomases OIC, 7/7/95, at 36-37; Tripp 302, 3/27/95-3/28/95, at 2-3.

[334] USPP Report, 7/27/93, at 1 (Beryl Anthony interview).

In that commencement address, Mr. Foster also noted that there will be "failures, and criticisms and bad press and lies, stormy days and cloudy days." He advised to "[t]ake time out for yourself. Have some fun, go fishing, every once in a while take a walk in the woods by yourself." He suggested that "[i]f you find yourself getting burned out or unfulfilled, unappreciated[,] . . . have the courage to make a change."

The Travel Office matter, in particular, was the subject of public controversy beginning in May 1993 and continuing through Mr. Foster's death. Criticism focused on the White House's handling of the matter before and after the May 19 firings. Legislation enacted on July 2, 1993, required the General Accounting Office (GAO) to investigate the Travel Office firings. There was a possibility of some form of congressional review, or perhaps special counsel investigation, as well as the GAO investigation.[335] During the week of July 12, Mr. Foster contacted private attorneys seeking advice in connection with the Travel Office incident.[336]

At some point in the last weeks of his life, Mr. Foster wrote a note[337] that he had "made mistakes from

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[335] *See, e.g., Appoint Special Counsel*, USA Today, July 19, 1993, at 10A; *The Travel Office Controversy Isn't Over*, Wash. Times, July 12, 1993, at F2; *A Stealthy, Evasive Confession*, N.Y. Times, July 11, 1993, at § 4, p. 18.

[336] *See* Beryl Anthony 302, 4/11/95, at 2; Beryl Anthony OIC, 6/25/96, at 5-6; Lyons 302, 5/12/94, at 3; Lyons OIC, 7/25/95, at 32-33.

[337] This note is not dated. Because it refers to the Travel Office incident, Mr. Foster must have written it at some point in the last several weeks of his life. The FBI Laboratory found one latent print on the note and later determined that the print belonged to

ignorance, inexperience and overwork" and that he "was not meant for the job or the spotlight of public life in Washington. Here ruining people is considered sport."[338]

Bernard Nussbaum. FBI Lab Report, 7/5/95, at 1. (Mr. Nussbaum handled the note after its discovery and before its production to the Park Police.) The note already was torn into pieces when produced to the Park Police; as received by Mr. Fiske's Office and the OIC, there was one missing piece to the note. The missing piece is from the bottom portion of the page, which appears to be blank.

[338] At the request of the OIC, the FBI Laboratory compared the original note to four original pages of known writing of Mr. Foster that the OIC had obtained from the documents that were in Mr. Foster's office at the time of his death. The Laboratory determined that the note and these four sheets were written by the same person (Vincent Foster). FBI Lab Report, 11/9/95, at 1.

The OIC also retained an independent handwriting expert, Gus R. Lesnevich. Mr. Lesnevich served in the Questioned Document Section of the U.S. Army Criminal Investigation Laboratory in Vietnam. In 1974, he joined the United States Secret Service and in 1976 became Senior Document Examiner at the Secret Service Identification Branch. In 1981, he entered private practice and has worked as an expert for federal and state law enforcement agencies, Legal Aid, and public defenders. He has qualified and testified as an expert witness in numerous state and federal courts throughout the United States. He was retained as a government expert in six cases in the Iran-Contra matter, and he has been retained in numerous other high-profile federal criminal cases.

In this matter, Mr. Lesnevich compared the original note to four original pages of known writing of Mr. Foster that were in his office at the time of his death; to one other original page of paper that was known to have been written by Mr. Foster; and to 18 original checks bearing the known writing of Mr. Foster. Mr. Lesnevich concluded that the written text on the note "contained normal, natural and spontaneous writing variations. These normal, natural and spontaneous writing variations can be found in the letter formations, beginning strokes, ending strokes, connecting

During that same period, according to Mr. Foster's immediate superior, Counsel Bernard Nussbaum, Mr. Foster's work effort decreased noticeably.[339] According

strokes, etc." Lesnevich Report at 2. He further concluded that "examination and comparison of the questioned written text appearing on the note with the known writing on the [known] documents has revealed that the author of the known documents wrote the note." *Id.* (reference numbers omitted). Mr. Lesnevich prepared a thorough 51-page comparison chart "that points out and illustrates a number of the normal, natural and spontaneous writing habits that were found common between the written text appearing on the questioned note and the known handwriting of Vincent Foster found on the [submitted known] documents." *Id.* at 3.

Previous investigations also commissioned handwriting analyses of the note. At the request of Mr. Fiske's office, the FBI Laboratory performed a handwriting analysis of the original note, comparing it to a "[h]andwriting sample bearing the purported known writing of Vincent Foster" and determined that the note was written by the same person who wrote the known sample. FBI Lab Report, 6/17/94, at 1-2. At the request of the Park Police, the United States Capitol Police performed a handwriting analysis of the note, comparing it to a copy of a handwritten letter of Mr. Foster that had been provided by Mrs. Foster. The U.S. Capitol Police concluded that "[b]oth the Known and Questioned Documents were completed by the same writer/author and that writer/author is known as Vincent W. Foster." Report of United States Capitol Police, Identification Section, 7/29/93, at 2.

The number of examinations, the experience and expertise of the many different examiners, the variety and quantity of known-sample documents, the fact that the examinations commissioned by the OIC and Mr. Fiske's Office were conducted with original documents (as opposed to photocopies), and the unanimity of the examiners in their conclusions together lead clearly to the conclusion that Mr. Foster wrote the note.

[339] Nussbaum 302, 6/8/95, at 6. Another witness said that he was told by Mr. Nussbaum that Mr. Foster's work product had deteriorated and that Mr. Foster had seemed distracted. 302, 10/23/95, at 14.

to William Kennedy, Sheila Anthony, and Lisa Foster, Mr. Foster said he was considering resigning.[340]

Mr. Foster's sister Sheila Anthony said that Mr. Foster told her on Friday, July 16 that he was depressed. She furnished him the names of three psychiatrists.[341] Mr. Foster did not speak to any of the three psychiatrists,[342] although phone records show that Mr. Foster attempted to contact one of them on July 16.[343] When Mr. Foster was found at Fort Marcy Park, a list of the three psychiatrists was in his wallet.[344]

Lisa Foster said that her husband cried while talking to her on Friday night, July 16 and that Mr. Foster mentioned resigning during the weekend of July 16-18.[345]

Meanwhile, Mr. Foster's mother, Alice Mae Foster, said that she talked to her son a day or two before his death and that he said he was unhappy because of his job and that it was "such a grind."[346]

On Monday, July 19, Mr. Foster contacted Dr. Larry Watkins, his physician in Little Rock, and was prescribed an antidepressant. Watkins' typed notes of July 21 say the following:

[340] Lisa Foster 302, 5/9/94, at 15; Kennedy OIC, 3/2/95, at 66- 67; Sheila Anthony 302, 4/28/94, at 9.

[341] Sheila Anthony 302, 4/28/94, at 7-8; *see also* USPP Report, 7/27/93, at 1 (Beryl Anthony interview); USPP Report, 7/29/93, at 2 (Lisa Foster interview).

[342] USPP Report (Rolla), 7/27/93, at 1.

[343] OIC Doc. No. DC-39-6.

[344] USPP Report (Rolla), 7/27/93, at 1.

[345] 302, 4/7/95, at 3, 5.

[346] Alice Mae Foster 302, 5/2/95, at 3.

> I talked to Vince on 7/19/93, at which time he complained of anorexia and insomnia. He had no GI [gastrointestinal] symptoms. We discussed the possibility of taking Axid or Zantac to help with any ulcer symptoms as he was under a lot of stress. He was concerned about the criticism they were getting and the long hours he was working at the White House. He did feel that he had some mild depression. I started him on Desyrel, 50 mg. He was to start with one at bedtime and move up to three. . . . I received word at 10:20 p.m. on 7/20/93 that he had committed suicide.[347]

Dr. Watkins said that it was unusual, even unprecedented, for Mr. Foster to call him directly.[348] Lisa Foster said that Mr. Foster took one tablet of the antidepressant medication on the night of the 19th.[349]

In short, the OIC cannot set forth a particular reason or set of reasons *why* Mr. Foster committed suicide. The important issue, from the standpoint of the death investigation, is whether Mr. Foster committed suicide. On that issue, the state-of-mind evidence is compelling, and it demonstrates that Mr. Foster was, in fact, distressed or depressed in a manner consistent with suicide. Indeed, the evidence was sufficient for Dr. Berman to conclude that "to a 100% degree of medical certainty, the death of Vincent Foster was a suicide."[350]

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[347] OIC Doc. No. DC-41-2.

[348] 302, 5/16/94, at 2.

[349] 302, 5/9/94, at 13.

[350] Berman Report at 15.

X. SUMMARY OF CONCLUSIONS

To sum up, the OIC has investigated the cause and manner of Mr. Foster's death. To ensure that all relevant issues were fully considered, carefully analyzed, and properly assessed, the OIC retained a number of experienced experts and criminal investigators. The experts included Dr. Brian D. Blackbourne, Dr. Henry C. Lee, and Dr. Alan L. Berman. The investigators included an FBI agent detailed from the FBI-MPD Cold Case Homicide Squad in Washington, D.C.; an investigator who also had extensive homicide experience as a detective with the Metropolitan Police Department in Washington, D.C., for over 20 years; and two other OIC investigators who had experience as FBI agents investigating the murders of federal officials and other homicides. The OIC legal staff in Washington, D.C., and Little Rock, Arkansas, participated in assessing the evidence, examining the analyses and conclusions of the OIC experts and investigators, and preparing this report.

The autopsy report and the reports of the pathologists retained by the OIC and Mr. Fiske's office demonstrate that the cause of death was a gunshot wound through the back of Mr. Foster's mouth and out the back of his head. The autopsy photographs depict the wound in the back of the head, and the photographs show the trajectory rod through the wound. The evidence, including the photographic evidence, reveals no other trauma or wounds on Mr. Foster's body.

The available evidence points clearly to suicide as the manner of death. That conclusion is based on the evidence gathered and the analyses performed during previous investigations, and the additional evidence gathered and analyses performed during the OIC

investigation, including the evaluations of Dr. Lee, Dr. Blackbourne, Dr. Berman, and the various OIC investigators.

When police and rescue personnel arrived at the scene, they found Mr. Foster dead with a gun in his right hand. That gun, the evidence tends to show, belonged to Mr. Foster. Gunshot residue-like material was observed on Mr. Foster's right hand in a manner consistent both with test firings of the gun and with the gun's cylinder gap. Gunshot residue was found in his mouth. DNA consistent with that of Mr. Foster was found on the gun. Blood was detected on the paper initially used to package the gun. Blood spatters were detected on the lifts from the gun. In addition, lead residue was found on the clothes worn by Mr. Foster when found at the scene. This evidence, taken together, leads to the conclusion that Mr. Foster fired this gun into his mouth. This evidence also leads to the conclusion that this shot was fired while he was wearing the clothes in which he was found. Mr. Foster's thumb was trapped in the trigger guard, and the trigger caused a noticeable indentation on the thumb, demonstrating that the gun remained in his hand after firing.

The police detected no signs of a struggle at the scene, and examination of Mr. Foster's clothes by Dr. Lee revealed no evidence of a struggle or of dragging. Nor does the evidence reveal that Mr. Foster was intoxicated or drugged.

Dr. Lee found gunshot residue in a sample of the soil from the place where Mr. Foster was found. He also found a bone chip containing DNA consistent with that of Mr. Foster in debris from the clothing. Dr. Lee observed blood-like spatter on vegetation in the photographs of the scene. Investigators found a quantity of blood under Mr. Foster's back and head when the body was turned, and Dr. Beyer, who performed the autopsy, found a large amount of blood in the body bag. In addition, the blood spatters on Mr. Foster's face had not been altered or smudged, contrary to what likely would have occurred had the body been moved and the head wrapped or cleaned. Fort Marcy Park is publicly accessible and traveled; Mr. Foster was discovered in that park in broad daylight; and no one saw Mr. Foster being carried into the park. All of this evidence, taken together, leads to the conclusion that the shot was fired by Mr. Foster where he was found in Fort Marcy Park.

The evidence with respect to state of mind points as well to suicide. Mr. Foster told his sister four days before his death that he was depressed; he cried at dinner with his wife four days before his death; he told his mother a day or two before his death that he was unhappy because work was "a grind"; he was consulting attorneys for legal advice the week before his death; he told several people he was considering resignation; he wrote a note that he "was not meant for the job or the spotlight of public life in Washington. Here ruining people is considered sport." The day before his death, he contacted a physician and indicated that he was under stress. He was prescribed antidepressant medication and took one tablet that evening.

Dr. Berman concluded that Mr. Foster's "last 96 hours show clear signs of crisis and uncharacteristic vulnerability."[351] Dr. Berman stated, furthermore, that "[t]here is little doubt that Foster was clinically depressed . . . in early 1993, and, perhaps, sub-clinically

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[351] Berman Report at 10.

even before this."[352] Dr. Berman concluded that "[i]n my opinion and to a 100% degree of medical certainty, the death of Vincent Foster was a suicide. No plausible evidence has been presented to support any other conclusion."[353]

In sum, based on all of the available evidence, which is considerable, the OIC agrees with the conclusion reached by every official entity that has examined the issue: Mr. Foster committed suicide by gunshot in Fort Marcy Park on July 20, 1993.

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[352] *Id.* at 9.

[353] *Id.* at 15.